CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 73

ANNA M. BOUTELL AND CARROLL M. BOUTELL, DOING BUSINESS AS F. J. BOUTELL SERVICE COMPANY, PETITIONERS,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1945.

CERTIORARI GRANTED JUNE 18, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 26, 1945.

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action File No. 3802

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff,

v.

ANNA P. BOUTELL and CARROLL M. BOUTELL, d. b. a. F. J. Boutell Service Company, Defendant

CALENDAR ENTRIES

June 1, 1943. Bill of complaint filed; summons issued; $5.00.

June 12, 1943. Summons returned and filed.

July 7, 1943. Amended bill of complaint filed.

Aug. 16, 1943. Defendants' answer filed; $5.00.

Sept. 18, 1943. Order for hearing September 27, 1943, filed and entered, L. 79, p. 56.

Sept. 27, 1943. Plaintiff's motion for summary judgment filed; hearing October 25, 1943; pre-trial hearing held; motion for summary judgment set for hearing October 25, 1943.

Oct. 25, 1943. Motion for summary judgment continued to November 1, 1943 for defendants' brief.

Nov. 1, 1943. Order granting leave to file*d*; amended answer entered; motion for summary judgment heard and submitted.

[fol. 2] Nov. 4, 1943. Order granting leave to file amended answer filed and entered; L. 81, p. 263; amended answer filed.

Dec. 28, 1943. Findings of fact and conclusions of law filed and entered; L. 83, p. 254.

Jan. 10, 1944. Judgment for plaintiff with costs to be taxed, filed and entered; $5.00.

Jan. 11, 1944. Stipulation to amend findings of fact and conclusions of law filed; amended findings of fact and conclusions of law filed and entered.

Jan. 21, 1944. Stipulation and order amending stipulation to amend findings of fact and conclusions of law filed; order entered; stipulation to amend the amended findings

of fact and conclusions of law filed; second amended findings of fact and conclusions of law filed and entered.

Mar. 24, 1944. Claim of appeal of defendants filed; $5.00; notice of claim of appeal filed.

Mar. 25, 1944. Proof of mailing of notice of appeal filed; supersedeas bond in $250.00 filed; National Surety Corporation Security March 20, 1944.

Apr. 18, 1944. Statement of points relied on by appellants filed.

Apr. 25, 1944. Designation of contents of the Record on Appeal.

Apr. 25, 1944. Stipulation re comparison of record.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 1, 1943

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) of the Fair Labor [fol. 3] Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III

Defendant, Anna P. Boutell, resides at 1402 East Court Street in the City of Flint, Michigan, within the jurisdiction of this court and is now, and at all times hereinafter mentioned was, one of the owners and partners of a place of business located at 210 Alexis Road, Toledo, Ohio, where she is engaged as one of the partners under the name and style of F. J. Boutell Service Company in the maintenance and repair of transportation equipment of the F. J. Boutell Drive-Away Company, a Michigan corporation.

IV

Defendant, Carroll M. Boutell, resides at 1123 Glengary Circle, Bloomfield Village, Michigan, within the jurisdiction of this court, and is now, and at all times hereinafter

mentioned was, one of the owners and partners of a place of business located at 210 Alexis Road, Toledo, Ohio, where he is, with other partners, engaged under the name and style of F. J. Boutell Service Company, in the maintenance and repair of the transportation equipment of the F. J. Boutell Drive-Away Company, a Michigan corporation.

V

At all times hereinafter mentioned, the defendants employed and are employing approximately 32 employees in and about their said place of business in Toledo, Ohio, in the repair and maintenance of motor transportation equipment and in processes and occupations necessary to motor transportation. The motor transportation equipment, consisting of trucks, tractors and trailers, that is maintained [fol. 4] and repaired by the defendants' employees is owned by the F. J. Boutell Drive-Away Company, a Michigan corporation engaged in the transportation of automobiles and army equipment such as jeeps and armored trucks. The automobiles and army equipment are transported by the F. J. Boutell Drive-Away Company in interstate commerce into and through states other than the states of Ohio and Michigan. The employees of the defendants by reason of their employment in the manner aforesaid are engaged in interstate commerce.

VI

Defendants repeatedly have violated and are violating the provisions of Sections 7 and 15(a)(2) of the Act by employing many of their employees engaged in interstate commerce, as aforesaid, for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42 and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed.

VII

Defendants have, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of Section 15(a)(2) of the Act, both permanently and during the pendency of this action, [fol. 5] and such other and further relief as may be necessary and appropriate.

(Sgd.) Irving J. Levy, Acting Solicitor; (Sgd.) Charles A. Reynard, Regional Attorney; (Sgd.) Franklyn W. Bair, Attorney, United States Department of Labor, Attorneys for Plaintiff.

Post Office Address: % Wage and Hour Division, U. S. Department of Labor, 4094, Main Post Office Building; or % Wage and Hour Division, U. S. Department of Labor, Washington, D. C.

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed July 7, 1943

I

Plaintiff brings this, his amended complaint as a matter of course before filing or service of a responsive pleading to his original complaint filed herein on June 1, 1943, to enjoin defendants from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*), hereinafter called the Act.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

[fol. 6] III

F. J. Boutell Service Company is a partnership consisting of Anna P. Boutell, Carroll M. Boutell, Marvin E. Boutell, and Wilbur H. Boutell, partners. Said partnership, by its partners, maintains a place of business located at 210 Alexis Road in the City of Toledo, Lucas County, Ohio, where it is engaged in the maintenance and repair of transportation equipment owned and operated by the

F. J. Boutell Drive-Away Company, a Michigan corporation.

Said partnership, F. J. Boutell Service Company, named in this complaint is not made a party to this action because it is not subject to the jurisdiction of this Court.

IV

Defendant, Anna P. Boutell, resides at 1402 East Court Street in the City of Flint, Michigan, within the jurisdiction of this Court and is now, and at all times hereinafter mentioned was, one of the owners and partners of the partnership hereinabove mentioned, F. J. Boutell Service Company.

V

Defendant, Carroll M. Boutell, resides at 1123 Glengary Circle, Bloomfield Village, Michigan, within the jurisdiction of this Court, and is now, and at all times hereinafter mentioned was, one of the owners and partners of the partnership hereinabove mentioned, F. J. Boutell Service Company.

VI

Marvin E. Boutell named in this complaint is not made a party to this action because he is not subject to the jurisdiction of this Court.

Wilbur H. Boutell named in this complaint is not made a party to this action because he is not subject to the jurisdiction of this Court.

[fol. 7]

VII

At all times hereinafter mentioned, the defendants employed and are employing approximately 32 employees in and about their said place of business in Toledo, Ohio in the repair and maintenance of motor transportation equipment and in processes and occupations necessary to motor transportation. The motor transportation equipment, consisting of trucks, tractors and trailers, that is maintained and repaired by the defendants' employees is owned by the F. J. Boutell Drive-Away Company, a Michigan corporation engaged in the transportation of automobiles and army equipment such as jeeps and armored trucks. The automobiles and army equipment are transported by the F. J. Boutell Drive-Away Company in interstate commerce

into and through states other than the states of Ohio and Michigan. The employees of the defendants by reason of their employment in the manner aforesaid are engaged in interstate commerce.

VIII

Defendants repeatedly have violated and are violating the provisions of sections 7 and 15(a)(2) of the Act by employing many of their employees engaged in interstate commerce, as aforesaid, for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed.

IX

Defendants have, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by section 17 of the Act.

[fol. 8] Wherefore, cause having been shown, plaintiff demands judgment enjoining and restraining defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the provisions of section 15(a)(2) of the Act, both permanently and during the pendency of this action, and such other and further relief as may be necessary and appropriate.

(Sgd.) Douglas B. Maggs, Solicitor; Irving J. Levy, Associated Solicitor; Charles A. Reynard, Regional Attorney; Franklyn W. Bair, Attorney; United States Department of Labor; Attorneys for Plaintiff. Post Office Address: U. S. Department of Labor, 4094 Post Office Building, Cleveland 13, Ohio, or Office of the Solicitor, Department of Labor, Washington 25, D. C.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 16, 1943

Now comes Anna M. Boutell, who is designated in plaintiff's Amended Bill of Complaint at Anna P. Boutell, but which should be Anna M. Boutell, and Carroll M. Boutell, d. b. a. F. J. Boutell Service Company, by their attorneys, [fol. 9] Prescott and Coulter, and by way of answer to plaintiff's amended bill of complaint allege:

I

The allegations contained in Paragraph I of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

II

The allegations contained in Paragraph II of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

III

It is admitted that the F. J. Boutell Service Company is a partnership consisting of Anna M. Boutell, Carroll M. Boutell, Marvin E. Boutell and Wilbur H. Boutell, partners, said partnership, by its partners, maintaining a place of business located at 210 Alexis Road in the City of Toledo, Lucas County, Ohio, where it is engaged in the maintenance and repair of transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation. However, the remaining allegations contained in paragraph III are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

IV

The allegations contained in Paragraph IV are admitted.

V

The allegations contained in Paragraph V are admitted.

VI

The allegations contained in Paragraph VI are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

[fol. 10]

VII

The allegations contained in Paragraph VII are admitted.

VIII

The allegations contained in Paragraph VIII are denied in such detail as though herein again repeated, with the exception of the allegation that the F. J. Boutell Service Company are employing many of the employees for work weeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed, which is admitted.

IX

The allegations contained in Paragraph IX of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

AFFIRMATIVE DEFENSE

By way of further answer to the plaintiff's amended bill of complaint, defendants allege:

I

The only employees involved in this action are mechanics who are now and have been engaged exclusively in the repair and maintenance of motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation, which for more than a year prior hereto has been engaged in the transportation of Army Ordnance materiel, and which prior to that time had been engaged in the transportation of automobiles.

II

The above-mentioned employees by reason of being engaged in the repair and maintenance of motor transporta-
[fol. 11] tion equipment are thereby performing work related to the safety of operation of the equipment owned and operated by the F. J. Boutell Drive-Away Company.

III

Since 1939 the F. J. Boutell Service Company has been operating under a labor contract which specified the number of hours to be worked and the wages to be paid its employees. The Union contract under which the F. J. Boutell Service Company is presently operating is known and designated as a standard city-wide form of labor contract in the Toledo Area. The contract under which the F. J. Boutell Service Company is now operating is one entered into with Local 1042, International Association of Machinists, which contract will expire on March 5, 1944, a copy of which marked Exhibit "1" is attached hereto and made a part hereof. The first labor contract entered into in 1939 contained the previously established workweek and in this respect there has been no change in subsequent contracts.

IV

The F. J. Boutell Service Company is not violating and has not violated any of the provisions of the Fair Labor Standards Act, so-called, for the reason that it is exempt from the operation of the Fair Labor Standards Act by reason of Section 13 (b) (1) thereof, which provides that it "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935." Section 204 (a) (1) of the Motor Carrier Act of 1935 provides as follows:

(a) "It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifica-

[fol. 12] tions and maximum hours of service of employees and safety of operation and equipment."

By virtue of the provisions of the section last above quoted, the Interstate Commerce Commission has exclusive jurisdiction to regulate the hours of work of all of the employees involved in this proceeding who are mechanics employed in connection with maintenance and repair of equipment closely related to the safety of operations of said equipment.

Wherefore, the defendants pray that said amended bill of complaint may be dismissed by this Honorable Court with costs to the defendants.

(Sgd.) Prescott & Coulter, Attorneys for Defendants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Attorneys of Counsel for Defendants, 903 Genesee Bank Building, Flint, Michigan.

Dated: Detroit, Michigan, August 16, 1943.
True copy.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed November 4, 1943

Now comes Anna M. Boutell, who is designated in plaintiff's Amended Bill of Comp-a-nt as Anna P. Boutell, but which should be Anna M. Boutell, and Carroll M. Boutell, d. b. a. F. J. Boutell Service Company, by their attorneys, Prescott and Coulter, and by way of answer to plaintiff's amended bill of complaint allege:

[fol. 13] I

The allegations contained in Paragraph I of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

II

The allegations contained in Paragraph II of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

III

It is admitted that the F. J. Boutell Service Company is a partnership consisting of Anna M. Boutell, Carroll M. Boutell, Marvin E. Boutell and Wilbur H. Boutell, partners, said partnership, by its partners, maintaining a place of business located at 210 Alexis Road in the City of Toledo, Lucas County, Ohio, where it is engaged in the maintenance and repair of transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation. However, the remaining allegations contained in paragraph III are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

IV

The allegations contained in Paragraph IV are admitted.

V

The allegations contained in Paragraph V are admitted.

VI

The allegations contained in Paragraph VI are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

[fol. 14]

VII

The allegations contained in Paragraph VII are neither admitted nor denied for want of knowledge sufficient to form a belief, and the plaintiff is left to his proofs thereon.

VIII

The allegations contained in Paragraph VIII are denied in such detail as though herein again repeated, with the exception of the allegation that the F. J. Boutell Service Company are employing many of the employees for work weeks longer than 44 hours during the year beginning October 24, 1938, for work weeks longer than 42 hours during the year beginning October 24, 1939, and for work weeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in work weeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed, which is admitted.

IX

The allegations contained in Paragraph IX of plaintiff's amended bill of complaint are neither admitted nor denied for want of knowledge sufficient to form a belief and the plaintiff is left to his proofs thereon.

AFFIRMATIVE DEFENSE

By way of further answer to the plaintiff's amended bill of complaint, defendants allege:

I

The only employees involved in this action are mechanics who are now and have been engaged exclusively in the repair and maintenance of motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, a Michigan corporation, which for more than a [fol. 15] year prior hereto has been engaged in the transportation of Army Ordnance materiel, and which prior to that time had been engaged in the transportation of automobiles.

II

The above-mentioned employees by reason of being engaged in the repair and maintenance of motor transportation equipment are thereby employed by a service establishment.

III

The above-mentioned employees by reason of being engaged in the repair and maintenance of motor transportation equipment are thereby performing work related to the safety of operation of the equipment owned and operated by the F. J. Boutell Drive-Away Company.

IV

Since 1939 the F. J. Boutell Service Company has been operating under a labor contract which specified the number of hours to be worked and the wages to be paid its employees. The Union contract under which the F. J. Boutell Service Company is presently operating is known and designated as a standard city-wide form of labor contract in the Toledo Area. The contract under which the F. J. Boutell Service Company is now operating is one

entered into with Local 1042, International Association of Machinists, which contract will expire on March 5, 1944, a copy of which marked Exhibit "1" is attached hereto and made a part hereof. The first labor contract entered into in 1939 continued the previously established workweek and in this respect there has been no change in subsequent contracts.

V

The F. J. Boutell Service Company is not violating and has not violated any of the provisions of the Fair Labor Standards Act, so-called, for the reason that it is exempt from the operation of the Fair Labor Standards Act by reason of Section 13(a) (2) thereof, which provides that it [fol. 16] "shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

By virtue of the provisions of the section last above quoted, the employees involved in this proceeding are exempt from the Fair Labor Standards Act inasmuch as the defendant is a service establishment the greater part of whose servicing is in intrastate commerce.

VI

The F. J. Boutell Service Company is not violating and has not violated any of the provisions of the Fair Labor Standards Act, so-called, for the reason that it is exempt from the operation of the Fair Labor Standards Act by reason of Section 13 (b) (1) thereof, which provides that it "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935." Section 204 (a) (1) of the Motor Carrier Act of 1935 provides as follows:

(a) "It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

By virtue of the provisions of the section last above quoted, the Interstate Commerce Commission has exclusive jurisdiction to regulate the hours of work of all of the employees involved in this proceeding who are mechanics employed in connection with maintenance and repair of equipment closely related to the safety of operations of said equipment.

[fol. 17] Wherefore, the defendants pray that said amended bill of complaint may be dismissed by this Honorable Court with costs to the defendants.

(Sgd.) Prescott & Coulter, Attorneys for Defendants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel, 903 Genesee Bank Building, Flint, Michigan.

Dated: Detroit, Michigan, October 25, 1943.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND NOTICE OF MOTION—Filed September 27, 1943

To Prescott & Coulter, 1703 Ford Building, Detroit, Michigan.

SIRS:

Please take notice that upon the amended complaint and answer filed herein, the undersigned will move this Court at Room 712, United States Courts and Post Office Building, City of Detroit, on the 25th day of October, 1943, at 10 o'clock A. M., of that day or as soon thereafter as counsel can be heard, for an order granting summary judgment in favor of the plaintiff in accordance with the prayer of the amended complaint, pursuant to Rule 56 of the Federal Rules of Civil Procedure, because the pleadings consisting of said amended complaint and answer, show there is no genuine issue as to any material fact and that [fol. 18] the plaintiff is entitled to a judgment as a matter of law, or for such other and further relief as the Court may deem just, with costs.

(Sgd.) Douglas B. Maggs, Solicitor; Irving J. Levy, Associate Solicitor; Charles A. Reynard, Regional Attorney; Franklyn W. Bair, Attorney; Attorneys for Plaintiff.

Service of a copy of the foregoing motion has been made on counsel for defendant by personally handing him a copy of the same this 27th day of September, 1943.

(Sgd.) Charles A. Reynard, Regional Attorney, Attorney for Plaintiff.

In United States District Court

Findings of Fact and Conclusions of Law—Filed December 28, 1943

Findings of Fact

This case comes up on a motion for summary judgment in accordance with the provisions of Rule 56 of the Rules of Civil Procedure. The motion is based entirely upon the amended complaint and amended answer; but at the oral argument on the motion it was conceded that the facts were as set forth in the defendant's brief, and this statement of facts is adopted as the findings of fact of the court, and are as follows:

[fol. 19] 1. The defendants are members and part owners of a partnership which does business under the name and designation of the F. J. Boutell Service Company. Wilbur H. and Marvin E. Boutell are the remaining members of the said partnership, but are not named as parties defendant for the reason that they are not within the jurisdiction of this court.

2. The defendants in their partnership operation maintain a place of business at 210 Alexis Road in the City of Toledo, Ohio, where they are engaged in the repair and maintenance of motor transportation equipment. The motor transportation equipment, consisting of trucks, trailers and tractors, upon which the employees of the F. J. Boutell Service Company exclusively work is owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the F. J. Boutell Service Company. However, the four above-mentioned partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company.

3. The F. J. Boutell Drive-Away Company has for more than a year prior hereto been engaged in the transportation of Army Ordnance materiel in interstate commerce, and prior to that time had been engaged in the transportation of new automobiles to distributors.

(It was admitted at the ora' argument that substantially all of the business of the F. J. Boutell Drive-Away Company has been in interstate commerce.)

4. The defendants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and since the effective date of the Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate.

[fol. 20] At the present time a labor contract is in existence between Local 1042 of the International Association of Machinists and the F. J. Boutell Service Company.

CONCLUSIONS OF LAW

There being no genuine issue as to any of the material facts involved, and it appearing that plaintiff is entitled to judgment in accordance with the prayer of its amended complaint, such a judgment may be submitted for entry on Monday, January 10, 1944, at eleven a. m.

(Sgd.) Arthur F. Lederle, District Judge.

Dated December 28, 1943.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed January 10, 1944

This matter coming on to be heard upbn the amended complaint of plaintiff, the amended answer of defendant, plaintiff's motion for summary judgment and the briefs and oral argument of both parties; and the Court having heretofore made its conclusions of law in which it found

that plaintiff is entitled to judgment in accordance with the prayer of his amended complaint,

Now, therefore it is by the Court

Ordered, adjudged and decreed that defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, be, and they hereby are, permanently enjoined and restrained from violating the provisions of section 15(a) (2) of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, [fol. 21] 52 Stat. 1060, U. S. C. Title 29, Sec. 201, et seq.) hereinafter referred to as the Act, in any of the following manners:

The defendant shall not, contrary to section 7 of the Act, employ any of its employees engaged in commerce or in the production of goods for commerce, as defined by the Act, for a workweek longer than forty hours, unless the employee receives compensation for his employment in excess of forty hours at a rate not less than one and one-half times the regulate rate at which he is employed.

It is further ordered, adjudged and decreed that the costs be, and they hereby are, assessed against defendants.

Arthur F. Lederle, United States District Judge.

Dated January 10, 1944.

STIPULATION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 11, 1944

It is hereby stipulated between the parties to the above entitled cause through their respective counsel that the Findings of Fact and Conclusions of Law submitted and entered by Judge Lederle on Monday, January 10, 1944, at eleven o'clock, a. m., shall be amended in the following manner:

FINDING OF FACT

4. The defendants' employes involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and [fol. 22] are therefore engaged in activities affecting the safety of operation of motor vehicles owned and operated in interstate commerce, and since the effective date of the

Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission, beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate.

CONCLUSIONS OF LAW

1. The employees of the F. J. Boutell Service Company are not employees of a "carrier" and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Fair Labor Standards Act.

2. The F. J. Boutell Service Company is not a retail or service establishment as defined in the Act, since the greater part of its servicing or selling is not in intrastate commerce and since its does not serve the general consuming public.

(Sgd.) Charles A. Reynard, Regional Attorney; Carton, Gault & Davison, Of Counsel; Prescott & Coulter, Attorneys for Defendants.

Dated: Detroit, Michigan, January 11, 1944.

[fol. 23] IN UNITED STATES DISTRICT COURT

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 11, 1944

FINDINGS OF FACT

This case comes up on a motion for summary judgment in accordance with the provisions of Rule 56 of the Rules of Civil Procedure. The motion is based entirely upon the amended complaint and amended answer; but at the oral argument on the motion it was conceded that the facts were as set forth in the defendant's brief, and this statement of facts is adopted as the findings of fact of the court, and are as follows:

1. The defendants are members and part owners of a partnership which does business under the name and designation of the F. J. Boutell Service Company. Wilbur H. and Marvin E. Boutell are the remaining members of the said partnership, but are not named as parties defendant

for the reason that they are not within the jurisdiction of this court.

2. The defendants in their partnership operation maintain a place of business at 210 Alexis Road in the City of Toledo, Ohio, where they are engaged in the repair and maintenance of motor transportation equipment. The motor transportation equipment consisting of trucks, trailers and tractors, upon which the employees of the F. J. Boutell Service Company exclusively work is owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the F. J. Boutell Service Company. However, the four above-mentioned partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company.

3. The F. J. Boutell Drive-Away Company has for more than a year prior hereto been engaged in the transporta-
[fol. 24] tion of Army Ordnance materiel in interstate commerce, and prior to that time had been engaged in the transportation of new automobiles to distributors.

(It was admitted at the oral argument that substantially all of the business of the F. J. Boutell Drive-Away Company has been interstate commerce.)

4. The defendants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and are therefore engaged in activities affecting the safety of operation of motor vehicles owned and operated in interstate commerce, and since the effective date of the Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission, beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate.

At the present time a labor contract is in existence between Local 1042 of the International Association of Machinists and the F. J. Boutell Service Company.

Conclusions of Law

1. The employees of the F. J. Boutell Service Company are not employees of a "carrier" and are therefore not

subject to the exemption provided in Section 13 (b) (1) of the Fair Labor Standards Act.

2. The F. J. Boutell Service Company is not a retail or service establishment as defined in the Act, since the greater part of its servicing or selling is not in intrastate commerce and since it does not serve the general consuming public.

There being no genuine issue as to any of the material facts involved, and it appearing that plaintiff is entitled to judgment in accordance with the prayer of its amended complaint, such a judgment may be submitted for entry on Monday, January 10, 1944, at eleven o'clock A. M.

(Sgd.) Arthur F. Lederle, District Judge.

Dated: January 21, 1944.

[fol. 25] In United States District Court

Stipulation to Amend the Amended Findings of Fact and Conclusions of Law—Filed January 21, 1944

It is hereby stipulated between the parties to the above entitled cause, through their respective counsel, that the Amended Findings of Fact and Conclusions of Law entered by Judge Lederle on Tuesday, January 11, 1944, at eleven o'clock A. M., shall be amended in the following manner:

Conclusions of Law

"1. The employees of the F. J. Boutell Service Company are not employees of a 'carrier' and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Fair Labor Standards Act.

"2. The F. J. Boutell Service Company is not a retail or service establishment as defined in the Act, since the greater part of its servicing or selling is not in intrastate commerce, and since it does not serve the general consuming public.

"There being no genuine issue as to any of the material facts involved, and it appearing that plaintiff is entitled to judgment in accordance with the prayer of

its amended complaint, such a judgment may be submitted for entry on Monday, January 10, 1944 at eleven o'clock, A. M."

(Sgd.) Charles A. Reynard, Regional Attorney; Carton, Gault & Davison, Of Counsel; Prescott & Coulter, Attorneys for Defendants.

Dated: January 21, 1944.

[fol. 26] In United States District Court

Order Amending Stipulation to Amend Findings of Fact and Conclusions of Law—Filed January 21, 1944

At a session of said Court held in the Federal Building in the City of Detroit, Wayne County, Michigan, on this 21st day of January, A. D. 1944.

Present: Honorable Judge Arthur F. Lederle, District Judge.

Upon reading and filing the attached stipulation;

It is hereby ordered that the Stipulation to Amend Findings of Fact and Conclusions of Law is hereby amended as follows:

"It is hereby stipulated between the parties to the above entitled cause through their respective counsel that the findings of fact and conclusions of law submitted and entered by Judge Lederle on December 28, 1943, shall be amended in the following manner."

(Sgd.) Arthur F. Lederle, District Judge.

In United States District Court

Stipulation to Amend the Stipulation to Amend Findings of Fact and Conclusions of Law—Filed January 21, 1944

It is hereby stipulated between the parties to the above entitled cause, through their respective counsel, that the Stipulation to Amend Findings of Fact and Conclusions of

[fol. 27] Law, dated January 11, 1944, shall be amended in the following manner:

"It is hereby stipulated between the parties to the above entitled cause through their respective counsel that the findings of fact and conclusions of law submitted and entered by Judge Lederle on December 28, 1943, shall be amended in the following manner."

(Sgd.) Charles A. Reynard, Regional Attorney; Carton, Gault & Davison, Of Counsel; Prescott & Coulter, Attorneys for Defendants.

Dated: Detroit, Michigan, January 21, 1944.

IN UNITED STATES DISTRICT COURT

NOTICE OF CLAIM OF APPEAL—Filed March 24, 1944

To: Irving J. Levy, Charles A. Reynard, and Franklyn W. Blair, Attorneys for Plaintiff and Appellee, 4094 Main Post Office Building, Cleveland, Ohio.

Please take notice that a claim of appeal from the judgment entered by the Honorable Arthur F. Lederle, Judge of the United States District Court, Eastern District of Michigan, entered on January 10, 1944, of which the attached is a true copy, was filed in the office of the Clerk of the United States District Court, Eastern District of Michigan, on March 24, 1944, at which time the appeal fee in the [fol. 28] amount of Five and no/100 ($5.00) dollars was paid by said defendants and appellants.

(Sgd.) Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

Dated: March 24, 1944.

IN UNITED STATES DISTRICT COURT

CLAIM OF APPEAL—Filed March 24, 1944

Anna M. Boutell and Carroll M. Boutell d/b/a F. J. Boutell Service Company, defendants and appellants in

the above entitled cause, claim an appeal from the judgment entered on the 10th day of January, 1944, by the Honorable Arthur F. Lederle, Judge of the United States District Court, Eastern District of Michigan. Defendants and appellants take a general appeal therefrom.

Dated at Detroit, Michigan, this 24th day of March, A. D. 1944.

(Sgd.) Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

[fol. 29] In United States District Court

Supersedeas Bond—Filed March 25, 1944

Know all men by these presents, that we, Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, of the County of Wayne and State of Michigan, as principals, and National Surety Corporation as surety, are held and firmly bound unto L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, the above-named plaintiff and appellee, in the sum of two hundred and fifty and no/100 ($250.00) dollars good and lawful money of the United States of America, to be paid unto the said L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, or to his certain attorney, successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, and each and every one of them, firmly by these presents.

Sealed with our seals and dated the 20th day of March, A. D. 1944.

Whereas, the above-named Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, defendants and appellants, have appealed from the summary judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, which judgment was entered on the 10th day of January, 1944, and in which cause of action Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, were

defendants, and L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, was plaintiff, and under the terms and conditions of which judgment the defendants, their agents, servants, employees and attorneys, and all persons acting or claiming to act in their behalf and interest, are permanently enjoined and restrained from violating the provisions of Section 15(a) (2) of the Fair Labor Standards Act, and now desire a stay on appeal;

[fol. 30] Now, therefore, the condition of this obligation is such that if the said Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, shall satisfy the terms and conditions of said judgment in full, unless reversed, together with costs, interest, and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interests and damages as the Appellate Court may charge and award, then this obligation shall be void; but otherwise shall remain in full force and effect.

(Sgd.) Anna Boutell, Carroll M. Boutell, d/b/a F. J. Boutell Service Company, Principals. Surety: National Surety Corporation, by R. L. Crossley.

Approved: Arthur F. Lederle (Sgd.), Judge of the U. S. District Court, Eastern District of Michigan.

Approved as to form: Charles A. Reynard (Sgd.), Attorney for Plaintiff and Appellee, March 22, 1944.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS RELIED ON BY APPELLANTS—Filed April 18, 1944

Pursuant to the Federal Rules of Civil Procedure, Rule 75-D the above-named defendants and appellants hereby state that in prosecuting their appeal to the Circuit Court of Appeals for the Sixth District they will rely upon the following points:

[fol. 31] (1) That the Court erred in finding that the employees of the F. J. Boutell Service Company were not subject to the exemption provided in Section 13(b) (1) of the Fair Labor Standards Act.

(2) That the Court erred in finding that the defendants and appellants herein have violated and are violating the provisions of Section 15(a) (2) of the Fair Labor Standards Act, during the period in question, by continuously employing their employees employed as mechanics for workweeks in excess of the maximum number of hours prescribed in Section 7 of the Fair Labor Standards Act without compensating the said employees for such overtime employment at a rate not less than one and one-half times the regular rates at which they were employed.

(3) That the Court erred in finding that the plaintiff and appellee herein is entitled to the injunction prayed for in the amended complaint.

(4) That the Court erred in entering a summary judgment on the amended bill of complaint of plaintiff and appellee herein against the defendants and appellants herein.

(5) That the Court erred in finding that the employees of the F. J. Boutell Service Company were not subject to the exemption provided in Section 13(a) (2) of the Fair Labor Standards Act.

And for the errors aforesaid, the said Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, say that the summary judgment of January 10, 1944, entered in said cause ought to be reversed, vacated and held for naught.

(Sgd.) Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit (26), Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

[fol. 32] IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN PROOF OF MAILING STATEMENT OF POINTS RELIED ON BY APPELLANTS—Filed April 18, 1944

STATE OF MICHIGAN,
County of Wayne, ss:

Mary H. Busse, being duly sworn, deposes and says that she is employed in the office of Prescott and Coulter, at-

torneys for Anna M. Boutell and Carroll M. Boutell, d/b/a F. J. Boutell Service Company, defendants and appellants in the above cause.

Deponent says that on the 18th day of April, 1944, she personally mailed to Charles A. Reynard, attorney for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff and appellee, a true copy of Statement of Points Relied On by Appellants, a copy of which is attached hereto and reference to which is prayed. That said Statement was mailed by placing the same in an envelope addressed to said Charles A. Reynard, at 4094 Post Office Building, Cleveland 13, Ohio, and bearing the notation "Registered Mail, Return Receipt Requested, Deliver to Addressee Only," with sufficient postage prepaid, which envelope was deposited with the Registry Division of the United States Post Office, Penobscot Branch, Detroit, Michigan.

Further deponent sayeth not.

Mary H. Busse.

Subscribed and sworn to before me this 18th day of April, 1944. Helen Czarnik, Notary Public, Wayne County, Michigan. My commission expires March 2, 1945.

[fol. 33] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF THE RECORD ON APPEAL—Filed April 25, 1944

It is hereby stipulated by and between the attorneys for the respective parties hereto that the following constitute the contents of record on appeal:

(1) Calendar entries.
(2) Complaint.
(3) Amended complaint.
(4) Answer.
(5) Amended answer.
(6) Plaintiff's motion for summary judgment and notice of motion.
(7) Findings of Fact and Conclusions of Law.
(8) Judgment.

(9) Stipulation to Amend Findings of Fact and Conclusions of Law.

(10) Amended Findings of Fact and Conclusions of Law.

(11) Stipulation to Amend the Amended Findings of Fact and Conclusions of Law.

(12) Order Amending Stipulation to Amend Findings of Fact and Conclusions of Law.

(13) Notice of Claim of Appeal and Claim of Appeal.

(14) Supersedeas Bond.

(15) Statement of Points Relied on by Appellants and Proof of Service thereof.

[fol. 34] (16) Stipulation re Comparison of Record.

(17) Designation of Contents of the Record on Appeal.

(18) Certificate of Clerk.

(Sgd.) Charles A. Reynard, Attorney for Plaintiff and Appellee, 4094 Post Office Building, Cleveland 13, Ohio. Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

[fol. 35] IN UNITED STATES DISTRICT COURT

STIPULATION RE COMPARISON OF RECORD—Filed April 25, 1944

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

(Sgd.) Charles A. Reynard, Attorney for Plaintiff and Appellee, 4094 Post Office Building, Cleveland 13, Ohio. Prescott & Coulter, Attorneys for Defendants and Appellants, 1703 Ford Building, Detroit, Michigan. Carton, Gault & Davison, Of Counsel for Defendants and Appellants, 903 Genesee Bank Building, Flint, Michigan.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] In United States Circuit Court of Appeals for the Sixth Circuit

Cause Argued and Submitted—December 4, 1944

Before: Allen, Hamilton and McAllister, JJ.

This cause is argued by Jack Newcombe for Appellants and by George M. Szabad for Appellee and is submitted to the Court.

In United States Circuit Court of Appeals

Judgment—Entered February 14, 1945

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 38] In United States Circuit Court of Appeals

Opinion—Filed February 14, 1945

Before Allen, Hamilton and McAllister, Circuit Judges

Allen, Circuit Judge. The sole question presented by this appeal is whether certain mechanics, employees of a partnership engaged exclusively in repairing and maintaining motor trucks used by a carrier in interstate commerce, are exempt from the provisions of the Fair Labor Standards Act under Section 13(a)(2) and (b)(1) of that enactment, Title 29, U. S. C., Section 201 et seq. The appellee filed a complaint joining the appellants, two mem-

bers of a partnership employing at their place of business in Toledo, Ohio, approximately 32 employees who service motor transportation equipment owned by the F. J. Boutell Drive-Away Company (a Michigan corporation, hereinafter called the Drive-Away Company) engaged in the interstate transportation of automobiles and army equipment such as jeeps and armored trucks. Other members of the partnership were not joined as parties defendant for the reason that they were not within the jurisdiction of the District Court. The bill charged that the appellants have repeatedly "violated and are violating the provisions of Sections 7 and 15 (a) (2) of the Act by employing many of their employees engaged in interstate commerce * * * for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42 and 40 hours, in workweeks during such periods, at rates not less than one and one-half times the regular rate at which they were employed."

The appellants' answer admitted that the automobiles and army equipment transported by the Drive-Away Company were carried in interstate commerce and that the appellants' employees, by reason of their employment, were engaged in interstate commerce. In an amended answer later filed to an amended complaint which made [fol. 39] the same allegations with reference to the interstate operation this was neither admitted nor denied. The material allegations of the complaint and amended complaint were either admitted or neither admitted nor denied, appellants' defense being grounded on the claim that their employees are exempt from the requirements of the Fair Labor Standards Act under its specific provisions.

Upon motion for summary judgment the court found the following facts in addition to those already stated:

> "The F. J. Boutell Drive-Away Company is a Michigan corporation and is an entity separate and distinct from the F. J. Boutell Service Company. However, * * * the partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company. * * *

"(It was admitted at the oral argument that substantially all of the business of the F. J. Boutell Drive-Away Company has been in interstate commerce.)

"4. The defendants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and since the effective date of the Motor Carrier Act have been employed for hours below the applicable maximum prescribed by the Interstate Commerce Commission beyond which the above-mentioned Motor Carrier Act requires payment at a specified overtime rate."

Finding that the appellee was entitled to judgment, the court issued a permanent injunction in accordance with the prayer of the amended complaint.

Appellants' first contention, that they are entitled to exemption under Section 13(a)(2) of the statute, which exempts employees "engaged in any . . . service establishment the greater part of whose . . . servicing is in intrastate commerce," is disposed of by the finding of the court and the concession of the appellants that substanti- [fol. 40] ally all of the business of the Drive-Away Company is in interstate commerce. The exemption applies only to those who perform the greater part of their service in intrastate commerce, and clearly the appellants' employees do not fall within this classification.

The test under the Fair Labor Standards Act as to whether an employee is engaged in interstate commerce is not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. *McLeod* v. *Threlkeld*, 319 U. S. 491, 497. We think the mechanics who service the motor vehicles which operate in interstate commerce are clearly a part of it. Cf. *United States* v. *American Trucking Associations*, 310 U. S. 534.

Appellants also contend that they are exempt from the obligation of the Fair Labor Standards Act under Section 13(b)(1), Title 29, U. S. C., Section 213(b), which provides that the maximum hours provisions of Section 207 shall not apply as to any employee with respect to whom the Interstate Commerce Commission has power

to establish qualifications and maximum hours of service as to their employees, pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935. It is urged that the Interstate Commerce Commission has such power with reference to appellants' employees under the material portions of Section 204, which read as follows:

"It shall be the duty of the Commission——

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicles as provided in this chapter, and to that end the Com- [fol. 41] mission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term 'motor carrier' shall be construed to include private carriers of property by motor vehicle in the administration of sections 204(c), 205, 220, 221, 222(a), (b), (d), (f), and (g), and 224."

Appellants contend that Section 204(a) of the Motor Carrier Act is to be construed in light of the intent of Congress (Cf. *United States* v. *American Trucking Associations, supra*, 538, 542) and that since the purpose of the Motor Carrier Act is to promote public safety, dependability and efficiency in the field of interstate motor transportation for hire, it is plain it intended this statute to cover all employees who repair motor vehicle equipment used in interstate transportation.

It is not claimed that the Drive-Away Company is a

common carrier, and the record does not disclose whether it is a contract carrier or a private carrier; but Section 204(a) of the Motor Carrier Act applies to all three classes of carriers. *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, 49. The employees sought to be exempted from the operation of the Fair Labor Standards Act are not employees of the Drive-Away Company, nor of any carrier. They are employees of an ordinary partnership which performs service upon motor equipment that is used in interstate commerce.

We think that the wording of the Motor Carrier Act, its legislative history, and its administrative interpretation, demonstrate that Congress did not intend to vest the Commission, under Section 204(a), with jurisdiction [fol. 42] over employees others than carriers. In the congressional reports explaining the purpose of the enactment it was repeatedly stated that the bill was meant to cover employees of motor carriers. The Interstate Commerce Commission has always held that it has no jurisdiction over employees working in commercial garages. *Ex Parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 Interstate Commerce Commission Reports, 125, 132. This interpretation is entitled to great weight. *United States* v. *American Trucking Associations, supra*, 549. The Supreme Court, in *Southland Gasoline Co.* v. *Bayley, supra*, 48, 49, pointed out that the purpose of Section 13(b)(1) of the Fair Labor Standards Act was "to free operators of motor vehicles from the regulation by two agencies of the hours of drivers," and concluded that "Since the employees of contract and common motor carriers * * * are exempt from the Fair Labor Standards provisions for maximum hours by virtue of the same words which govern private motor carriers' employees," the exemption also covers employees of private carriers of property by motor vehicle. This holding certainly does not indicate that the exemption applies to employees of other than carriers.

We conclude that by every canon of construction it would constitute judicial legislation to distort Section 204(a) of the Motor Carrier Act of 1935 in accordance with the appellants' contentions. The District Court correctly held that the appellants' employees were not exempt, and properly issued the injunction prayed for.

The judgment is affirmed.

[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 18, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 849, Martino vs. Michigan Window Cleaning Company.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 49719. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 73. Anna M. Boutell and Carroll M. Boutell, Doing Business as F. J. Boutell Service Company, Petitioners, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor. Petition for writ of certiorari and exhibit thereto. Filed May 14, 1945. Term No. 73 O. T. 1945.

United States of America

IN THE

Supreme Court of the United States

No. 1266 73

ANNA M. BOUTELL and CARROLL M. BOUTELL,
doing business as F. J. Boutell Service Company,
Petitioners and Appellants Below,
vs.
L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

HARRY G. GAULT,
Attorney for Appellants, Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company,
903 Genesee Bank Building,
Flint, Michigan.

CARTON, GAULT & DAVISON,
Attorneys of Counsel for Appellants,
903 Genesee Bank Building,
Flint, Michigan.

GLENN M. COULTER and
JACK NEWCOMBE,
Attorneys of Counsel for Appellants,
1703 Ford Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

MISCELLANEOUS CITATIONS

United States of America

IN THE

Supreme Court of the United States

No.....

ANNA M. BOUTELL and CARROLL M. BOUTELL, doing business as F. J. Boutell Service Company, Petitioners and Appellants Below,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Respondent and Appellee Below

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in equity brought in the District Court of the United States for the Eastern District of Michigan, Southern Division, by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Depart-

ment of Labor, respondent herein, against Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, petitioners herein, for a judgment enjoining and restraining petitioners herein, their agents, servants, employees, and attorneys, and all persons acting or claiming to act in their behalf and interest, from violating the maximum hour and minimum wage provisions of the Fair Labor Standards Act, so-called. Respondent herein filed a Motion for Summary Judgment based on the pleadings on file in the case and a judgment was rendered thereon in favor of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, against Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, as prayed.

An appeal from said judgment was taken by Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, petitioners herein, to the United States Circuit Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division. The only questions involved on said appeal were:

(1) Whether employees of the F. J. Boutell Service Company who are employed exclusively in the State of Ohio to service, repair and maintain motor transportation equipment owned and operated by a Motor Carrier are employed in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce"; and

(2) Whether the employees of the F. J. Boutell Service Company, who are employed exclusively to repair and maintain the motor transportation equipment of a Motor Carrier, engaged in interstate commerce, and who are

necessarily, because of the type of their work, engaged in work affecting "safety of operation of the motor vehicles," are subject to the jurisdiction of the Interstate Commerce Commission;

which questions were decided by said United States Circuit Court of Appeals for the Sixth Circuit and materially affected the determination of said appeal.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals for the Sixth Circuit in holding that the employees of the F. J. Boutell Service Company who service, repair and maintain motor transportation equipment owned and operated by a motor carrier are not employed in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" involves an important question of federal law which has not been, but should be, settled by this court.

2. The decision of the Circuit Court of Appeals in holding that the employees of the F. J. Boutell Service Company who are employed exclusively to repair and maintain the motor transportation equipment of a Motor Carrier engaged in interstate commerce and who are necessarily, because of the type of their work engaged in work affecting "safety of operation of the motor vehicles," are not subject to the jurisdiction of the Interstate Commerce Commission, involves an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the

United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9792, Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company, appellants, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by the Court; and for such further relief as to this Court may seem proper.

HARRY G. GAULT,
Attorney for Appellants, Anna M. Boutell and Carroll M. Boutell, doing business as F. J. Boutell Service Company.

CARTON, GAULT & DAVISON,
Attorneys of Counsel for Appellants.

GLENN M. COULTER and
JACK NEWCOMBE,
Attorneys of Counsel for Appellants.

May 1945.

United States of America

IN THE

Supreme Court of the United States

No.....

ANNA M. BOUTELL and CARROLL M. BOUTELL,
doing business as F. J. Boutell Service Company,
Petitioners and Appellants Below,
vs.
L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor,
Respondent and Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I.

OPINIONS OF COURTS BELOW

The Findings of Fact and Conclusions of Law together with the Judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, are not reported but are set forth on pages 18-20 of Petitioners' and Appellants' Record, and the Judgment is dated January 10, 1944.

The opinion and judgment of the United States Circuit Court of Appeals for the Sixth Circuit bears date of February 14, 1945, and is set forth on pages 37-38 of Petitioners' and Appellants' Record.

II.

JURISDICTION

1. The date of the judgment being reviewed is February 14, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is c. 517, Sec. 6, 26 Stat. 828 as amended (28 U.S.C.A., Sec. 347, Judicial Code, Sec. 240, amended):

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> "(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of

error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)"

3. Facts, nature of the case and ruling of the courts below bringing the case within the jurisdiction provision above quoted has already been stated in the preceding petition under I (page 1) which is hereby adopted and made a part of this brief.

III.

STATEMENT OF THE CASE

This has already been stated in the preceding petition under I (page 1), which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that employees of the F. J. Boutell Service Company who are employed exclusively in the State of Ohio to service, repair and maintain motor transportation equipment owned and operated by a Motor Carrier are not employed in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that qualifications and maximum hours of service of employees of the F. J. Boutell Service Company who are employed exclusively to repair and maintain motor transportation equipment of a Motor Carrier engaged in interstate commerce, and who are necessarily, because of the type of their work, engaged in work affecting "safety of operation of the motor vehicles," are not subject to the jurisdiction of the Interstate Commerce Commission under the provisions of the Motor Carrier Act of 1935.

V.

ARGUMENT

STATEMENT OF FACTS AND SUMMARY OF THE ARGUMENT

The appellants are members and part owners of a partnership which does business under the name and designation of the F. J. Boutell Service Company. Wilbur H. and Marvin E. Boutell are the remaining members of said partnership, but are not named as parties to the within cause for the reason that they are not within the jurisdiction of this Court.

The appellants in their partnership operation maintain a place of business at 210 Alexis Road in the City of Toledo, Ohio, where they are engaged in the repair and maintenance of motor transportation equipment. The motor transportation equipment, consisting of trucks, trailers and tractors, upon which the employees of the F. J. Boutell Service Company exclusively work, is owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation and is an entity separate and distinct from

the F. J. Boutell Service Company. However, the four above-mentioned partners of the F. J. Boutell Service Company are the sole stockholders of the F. J. Boutell Drive-Away Company.

The F. J. Boutell Drive-Away Company has for more than a year prior hereto been engaged in the transportation of Army Ordnance materiel in interstate commerce, and prior to that time had been engaged in the transportation of new automobiles to distributors.

The Appellants' employees involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company, and since the effective date of the Motor Carrier Act have been employed in accordance with the terms and provisions of said Act.

Point A

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY IN THE STATE OF OHIO TO SERVICE, REPAIR AND MAINTAIN MOTOR TRANSPORTATION EQUIPMENT OWNED AND OPERATED BY A MOTOR CARRIER, ARE NOT EMPLOYED IN A "RETAIL OR SERVICE ESTABLISHMENT THE GREATER PART OF WHOSE SELLING OR SERVICING IS IN INTRASTATE COMMERCE."

POINT B

THE COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE QUALIFICATIONS AND MAXIMUM HOURS OF SERVICE OF EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY TO REPAIR AND MAINTAIN THE MOTOR TRANSPORTATION EQUIPMENT OF A MOTOR CARRIER ENGAGED IN INTERSTATE COMMERCE AND WHO ARE NECESSARILY, BECAUSE OF THE TYPE OF THEIR WORK, ENGAGED IN WORK AFFECTING "SAFETY OF OPERATION OF THE MOTOR VEHICLES," ARE NOT SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION UNDER THE PROVISIONS OF THE MOTOR CARRIER ACT OF 1935.

POINT A

THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY IN THE STATE OF OHIO TO SERVICE, REPAIR AND MAINTAIN MOTOR TRANSPORTATION EQUIPMENT OWNED AND OPERATED BY A MOTOR CARRIER, ARE NOT EMPLOYED IN A "RETAIL OR SERVICE ESTABLISHMENT THE GREATER PART OF WHOSE SELLING OR SERVICING IS IN INTERSTATE COMMERCE"

The exemption provided in Section 13 (a) (2) of the Fair Labor Standards Act of 1938 removes from the benefits of overtime compensation as provided by Section 7 of the Fair Labor Standards Act of 1938, "Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Therefore, the employees of a retail dealer or service establishment the greater part of whose selling or servicing is in intrastate commerce is exempt from the

minimum wage and maximum hour provisions of the Fair Labor Standards Act. See *Super-Cold Southwest Co. v. McBride*, 124 Fed. (2d) 90. The question of whether a retail sale exists is not altered by the character of the sale or the use to which the consumer may put the purchased commodity. It is immaterial that the products sold were used subsequently for commercial purposes. See *Super-Cold Southwest Co. v. McBride, supra; White Motor Company v. Littleton*, 124 Federal (2d) 93.

It is immaterial whether the service is performed for a private or commercial use. See *Super-Cold Southwest Co. v. McBride, supra.* Also, it is immaterial if the service or retail establishment knows definitely that the product is ultimately to travel in interstate commerce. See *Rogers v. Glazer*, 32 Fed. Supp. 990, District Court, W. D. Missouri, April 16, 1940, Justice Roberts in a dissent to the majority opinion in *Warren-Bradshaw Drilling Co. v. Hull*, 317 U. S. 88, said:

> "I think Congress could not and did not intend to assert its granted power over interstate commerce upon what in practice and common understanding is purely local activity, on the pretext that everything anybody does is a contributing cause to the existence of commerce between the States, and in that sense necessary to its existence."

Justice Roberts' dissent was later followed in *Rogers v. Glazer, supra.*

The case of *L. Metcalfe Walling, Acting Administrator of the Wage and Hour Division, United States Department of Labor, v. John J. Casale, Inc.*, U. S. District Court, Southern Division of N. Y., Civil No. 17-7, March 26, 1943, presents the identical issue as presented in the principal case, however, the facts in the two cases being distinguishable. In the above-mentioned case the defend-

ant is the owner of a fleet of trucks and rents them to various trucking companies who are engaged in interstate transportation. Defendants' trucks are leased to some sixty-odd customers, consisting of wholesalers, jobbers, and distributors of manufactured goods. Incidental thereto the lessor maintains 22 garages for the servicing, housing and maintaining of his trucks, the garages being located in three different states. The work performed on the trucks is done by the defendants' employees and the work consists of greasing, refueling and repairing the vehicles and keeping them in proper order for use by the lessees. One of the numerous defenses raised by the defendant therein was that the defendants' employees engaged in the maintenance of the transportation equipment were employees of a service establishment the greater part of whose servicing was in intrastate commerce. Based on this defense, the defendant filed a motion to dismiss the plaintiff's bill of complaint. The Court denied the defendant's motion on the ground that, "As a result of the expenditure of large capital funds, defendant not only services, but has become the owner of, a huge fleet of vehicles that are leased to corporations and concerns, which in the aggregate engaged in a substantial amount of business in interstate commerce." Also, the Court on its own volition remarked that "if all the trucks here in question were owned and operated separately by the several business houses that use them, and if defendant's activities for a consideration were limited to greasing, repairing and servicing the same, the defense founded on Sec. 13(a)(2) of the Fair Labor Standards Act of 1938 might be strong enough to bring about a dismissal of the Bill." The facts of the case before the Court at the present time are the exact circumstances to which the Court was referring in the *Casale* case, *supra*. The transportation equipment upon which the employees of the

defendant work is owned and operated by the F. J. Boutell Drive-Away Company, a separate and distinct entity from the F. J. Boutell Service Company. The trucks are driven into Ohio by the drivers of the F. J. Boutell Drive-Away Company where they are then greased, repaired and serviced by the employees of the F. J. Boutell Service Company. When the trucks have been serviced, the F. J. Boutell Drive-Away Company employees then again call for the trucks and remove them from the premises of the F. J. Boutell Service Company. In other words, the exact set of facts the Court in the *Casale* case, *supra,* thought might justify a dismissal of the plaintiff's bill of complaint as falling within the exemption as set forth in Section 13(a)(2) of the Fair Labor Standards Act of 1938 are present in the case before the Court at this time.

The case of *Ellinger v. Goodyear Tire & Rubber Company,* U. S. District Court, Northern District of Iowa, Western Division, June 6, 1941, presents an analogous problem to that involved in the principal case. In the *Ellinger* case, *supra,* the defendant was engaged in merchandising tires, inner tubes, and other motor vehicle accessories for trucks and automobiles. Defendant rendered this service to the public generally and in this regard presents a fact not found in the principal case. The Court in the *Ellinger* case, *supra,* found that the defendant and likewise its employees were engaged in an intrastate service and also made intrastate retail sales. The fact that some of the automobiles and trucks on which repairs were made and accessories installed were known to be destined for other states did not change the character of the service or sale from intrastate to interstate. The fact that in the principal case the Service Company had but one customer instead of many, as in the *Ellinger* case, *supra,* should not result in a different principle ap-

plying in one case than in the other. The employees in both cases were performing identical duties, and likewise the employers were engaged in identical businesses.

See, also, *Jillo Bynum et al. v. Firestone Tire & Rubber Co.*, Tennessee, Court of Appeals, Western Section at Jackson, January 22, 1943, Certiorari denied, Tennessee Supreme Court, May 15, 1943, Petition for writ of certiorari to Court of Appeals of Tennessee denied November 8, 1943, wherein an automobile supply and service store similar to the store involved in the *Ellinger* case, *supra*, was involved with the same decision as in that case. Further, in the *Bynum* case, *supra*, the defendant Service store operated as a separate unit of the defendant Company. However, the Court said that inasmuch as the defendant service store operates as an independent dealer in purchasing its supplies and merchandise from the defendant Company and its competitors, and pays for the same from its own bank account, it constitutes a separate "establishment" for the purpose of determining whether the exemption provided in Section 13(a)(2) for employees of retail or service establishments applies.

In the principal case the F. J. Boutell Service Company is a separate and distinct entity from the F. J. Boutell Drive-Away Company. As in the *Bynum* case, *supra*, the Boutell Service Company purchases its own supplies and merchandise and pays for the same from its own bank account, so, on the basis of the *Bynum* case, *supra*, it likewise is a separate "establishment" for the purpose of determining whether the exemption provided in Section 13(a)(2) for employees of retail or service establishment applies.

In the recent case of *Thomas Martino v. Michigan Window Cleaning Co.*, decided October 18, 1944, by the United States Circuit Court of Appeals for the Sixth Circuit,

writ of certiorari to the United States Supreme Court being denied in 320 U. S. 785, the Court stated in its opinion:

> "Notwithstanding some more or less remote approaches to the present problem in *Kirschbaum v. Walling and Warren-Bradshaw Drilling Co. v. Hall*, it is impossible for us to entertain the concept that window cleaning becomes interstate commerce, or is in pursuance of the production of goods for commerce, by the fact that the windows that are cleaned are in the manufacturing establishments of industries engaged in interstate commerce, nor are we able to reject the concept that a window cleaning company is a service establishment under Section 13(a) of the Fair Labor Standards Act, even though the service it renders is not performed on its own premises. We adhere to our rationalization in *Lonas v. National Linen Service Corp.*, 136 Fed. (2d) 433; 7 Labor Cases 61, 661."

In the *Martino* case the employees in question were employed to wash the windows of a building housing concerns engaged in interstate commerce. As indicated by the quoted portion of the Court's opinion above, the Court was of the opinion that the employees in question were employed in a "retail or service establishment the greater portion of whose selling or servicing was in intrastate commerce," notwithstanding the fact that the building on which the work was being performed housed concerns purely engaged in interstate commerce. As indicated therein, this appears in conflict with the case of *Kirschbaum v. Walling, supra*, on which the appellee below places reliance. Although the type of employment is entirely different in the *Martino* case than in the present case, actually the principle involved is analogous. In the *Martino* case employees of an independent concern were engaged in washing windows of a building owned by a

person other than their employer. In the present case the employees in question were employed by the F. J. Boutell Service Company to repair and service trucking equipment owned and operated by the F. J. Boutell Drive-Away Company, a separate and distinct entity from the F. J. Boutell Service Company. In the *Martino* case the premises on which the employees worked housed concerns engaged in interstate commerce. In the present case the employees worked on trucks engaged in interstate commerce. Notwithstanding the fact that the tenants in the *Martino* case were engaged in interstate commerce, the Court held that the employees of the window cleaning establishment were engaged in a "retail or service establishment." Likewise, we believe this Court, in conformity with the *Martino* case, should hold that the employees of the F. J. Boutell Service Company, involved herein, are engaged in a "retail or service establishment," notwithstanding the fact that the trucks on which the employees worked are engaged in interstate commerce.

In the *Martino* case the Court was of the opinion that the employees in question were engaged in a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce," notwithstanding the fact that the service which was rendered was not performed on its own premises. In the present case this obstacle is not present inasmuch as the service the employees render is always performed on the premises of the F. J. Boutell Service Company.

POINT B

THE COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT THE QUALIFICATIONS AND MAXIMUM HOURS OF SERVICE OF EMPLOYEES OF THE F. J. BOUTELL SERVICE COMPANY WHO ARE EMPLOYED EXCLUSIVELY TO REPAIR AND MAINTAIN THE MOTOR TRANSPORTATION EQUIPMENT OF A MOTOR CARRIER ENGAGED IN INTERSTATE COMMERCE AND WHO ARE NECESSARILY, BECAUSE OF THE TYPE OF THEIR WORK, ENGAGED IN WORK AFFECTING "SAFETY OF OPERATION OF THE MOTOR VEHICLES," ARE NOT SUBJECT TO THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION UNDER THE PROVISIONS OF THE MOTOR CARRIER ACT OF 1935

In the case of *Keegan et al. v. Ruppert et al.*, United States District Court, Southern District of N. Y.; Civil No. 13-55, June 8, 1943, the complainants were automobile garage workers who devoted their energies to the maintenance of a large fleet of motor trucks which were leased to Jacob Ruppert by Casale, lessor, for use in the distribution of Ruppert's alcoholic beverage products in both intrastate and interstate commerce. There were a number of diversified problems involved in this case, but as applicable to the principal case the Court stated that the employees of the lessor who serviced, oiled, gassed, washed and repaired the trucks were engaged in interstate commerce as much as the drivers of the trucks, because the interstate business as conducted could not be carried on without their aid. Were it not for them, Ruppert's drivers could not drive the trucks. The Court in the *Keegan* case, *supra,* refused to place its decision on the theory that the lessor was a "service" establishment as such, and therefore exempt from the provisions of the Fair Labor Standards Act as coming within Section 13

(a) (2) of said Act. Instead, the Court placed its decision squarely on the theory that "mechanics who devoted a substantial portion of their time to the repair of trucks engaged in interstate commerce are within the jurisdiction of that Commission (Interstate Commerce Commission), and therefore, those of Casale's employees who devoted a substantial part of their time to the repair of trucks and thus were 'safety' workers are precluded from recovery against Casale," under the provisions of the Fair Labor Standards Act. These employees are rather within the jurisdiction of the Interstate Commerce Commission under the Motor Carriers Act of 1935, so-called. The *Keegan* case, *supra,* and the principal case are directly analogous as to the legal principle involved and also as to the majority of the facts. In both cases the mechanics are employed by a non-carrier to work exclusively on automobile equipment operated by a carrier. The only distinguishing feature in the two cases is that in the *Keegan* case, *supra,* the employer is the owner of the automobile equipment, whereas in the principal case the employer is not in any way connected with the ownership of the automobile equipment upon which its employees render service. This factual distinction had no bearing on the decision in the *Keegan* case, *supra,* and is in reality an immaterial distinction.

Section 13(b)(1) of the Fair Labor Standards Act expressly removes from the benefits of the overtime provisions as set forth in Section 7 of the Fair Labor Standards Act any employee with respect to whom the Interstate Commerce Commission has "power" to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935. One must, therefore, look to Section 204 of the Motor Carrier Act of 1935 and Court decisions thereunder in order to determine the scope of the exemp-

tion as provided in Section 13(b)(1) of the Fair Labor Standards Act of 1938.

The Motor Carrier Act lays little emphasis on the clauses "qualifications and maximum hours of service of employees" or "safety of operation." Neither of these terms are defined in Section 203, 49 U.S.C.A., Sec. 303, the Section of the Act devoted to the explanation and meaning of the words used in the Act. They are part of an enactment passed in an attempt to adjust a new and growing transportation service to the needs of the public. To find their content, they must be viewed in their setting. See *United States v. American Trucking Association*, 84 Law Ed. 1345, 310 U. S. 534. Therefore, under these circumstances, rather than rendering a decision on phraseology alone, the Court should interpret the phraseology of the statute in view of the evil then existing which the Legislature sought to remedy by the enactment, together with judicial interpretations thereof if any should exist.

> "Where to follow the plain meaning of words in a statute will lead, though not to absurdities, to an unreasonable result plainly at variance with the policy of the legislation as a whole, the Court will follow the purpose of the statute rather than its literal words." See *U. S. v. American Trucking Association, supra.*

The Court in *Byers Transportation Company v. United States*, 49 Fed. Supp. 828, District Court, W. D. Missouri, April 3, 1943, expressly stated that "The purpose of the Motor Carrier Act was to promote public safety, dependability and efficiency in the field of interstate motor transportation for hire." While efficient and economical movement in interstate commerce is obviously a major object of the Motor Carrier Act of 1935, there are numerous provisions which make it clear that Congress intended to exercise its powers in the non-transportation phases of

motor carrier activity. See *U. S. v. American Trucking Association, supra; Gibson v. Glasgow*, 157 Southwestern, 2d Ed. 814, Supreme Court Tennessee, January 17, 1942.

As often expressed, one of the purposes or objectives of Section 204 of the Motor Carrier Act of 1935 was to promote public service, and in order to bring about the same, to regulate the activities of employees engaged in safety of operation of interstate motor vehicles. It is elementary that by regulating mechanics, as are here involved, safety of travel is assured—the very object the Legislature had in view in enacting the Motor Carrier Act of 1935. If the Court literally interprets Section 204 of the Motor Carrier Act of 1935, this avowed purpose would be defeated.

In Wage and Hour Division Interpretative Bulletin No. 9, it is stated:

> "It is the opinion of the Wage and Hour Division that many employees of wholesale establishments engaged in the distribution within a State of goods which have been received from other States are engaged in interstate commerce within the meaning of the Fair Labor Standards Act. The Interstate Commerce Commission has jurisdiction under section 204 of the Motor Carrier Act, 1935, over employees of carriers engaged in transportation in interstate or foreign commerce whose duties affect the safety of operation of motor vehicles. The Division deems it necessary for enforcement purposes to consider any employees of wholesale establishments who engage in interstate commerce under the Fair Labor Standards Act and whose duties affect the safety of operation of motor vehicles as exempt from the overtime provisions of the Act under section 13(b)(1). While the question may not be free from doubt since earlier decisions of the Interstate Commerce Commission seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Stand-

> ards Act, nevertheless if such employees are engaged in interstate commerce within the meaning of the Fair Labor Standards Act, it is the policy of the Division to regard them as likewise engaged in interstate commerce within the meaning of the Interstate Commerce Act. This position is, of course, taken without prejudice to the rights of the employees under section 16 (b) of the Act."

In determining whether an employee is engaged in commerce or production of goods for commerce, and therefore subject to the Fair Labor Standards Act of 1938, the character of the employees' activities rather than the nature of the employer's business is the deciding factor. See *Overstreet v. North Shore Corporation,* 63 Supreme Court 494, 318 U. S. 125; *Fleming v. Jacksonville Paper Company,* 128 Fed. 2d Ed. 395; *Samuels v. Housten,* 46 Fed. Supp. 364, District Court, S. D. Georgia, Augusta, June 30, 1942; *Gibson v. Glasgow, supra; People v. Horton Motor Lines,* 60 Supreme Court 1059; *Bracey v. Luray,* 49 Fed. Supp. 821, Civil Actions No. 1744, District Court, D. Maryland, March 13, 1943.

Safety of operation of interstate transportation facilities depends on safe mechanical equipment as well as on proper operation by human agencies. The care and repair of motors, lights, brakes, bearings and other appliances and parts of a motor vehicle, in an important manner, affects the safety of operation of said vehicle. See *West v. Smoky Mountain Stages,* 40 Fed. Supp. 296. Certainly the activities of defendants' employees involved herein, whose primary duties are to keep the motor vehicles of an interstate carrier in good and safe working condition, do affect the safety of operation of the said vehicle. To be consistent, the application of Section 13(b)(1) of the Fair Labor Standards Act of 1938 should be governed by the character of the employees' duties rather than the

nature of the employer's business, and therefore the Interstate Commerce Commission should have jurisdiction to establish qualifications and maximum hours of service for the employees herein involved.

It is not the appellants' contention that the Interstate Commerce Commission has jurisdiction to establish qualifications and maximum hours of service for *all* employees of a carrier or service establishment. We do contend, however, that all those employees engaged in activities affecting the "safety of operation" of the Motor Carrier are indiscriminately within the jurisdiction of the Interstate Commerce Commission. This contention is inescapable when the purpose and object of the Legislature in enacting the Motor Carrier Act of 1935 are borne in mind. It should be remembered that the section of the Motor Carrier Act of 1935 here involved was a Committee amendment to the original Act and when *Mr. McManamy, Chairman of the Legislative Committee of the Commission,* explained the provisions of this amendment from the floor of the Senate, he merely said, "It relates to safety."

Further, in *United States v. American Trucking Association, supra,* the Court said:

> "The nature of interstate transportation business makes it necessary that one administrative agency have power to regulate qualifications and maximum hours of service for all business purposes and the Commission is the only Agency charged by Congress with the duty of executing its transportation policy."

Although in the above case the mechanics there involved were employed by a motor carrier, the same reasoning would apply to the mechanics here involved. It would certainly facilitate the transportation policy if the

Interstate Commerce Commission was deemed to have the power to regulate the employees employed to maintain transportation equipment rather than allowing the Interstate Commerce Commission to regulate merely the drivers of the Carrier, and then allowing the mechanics who are as much engaged in safety of operation as the drivers to be regulated by another Administrative Agency. It appears from Section 202(a) of the Motor Carrier Act of 1935 that the Legislature intended one administrative agency to regulate the transportation facilities necessary in order for a motor carrier to engage in interstate commerce. This section provides for the procurment of and the provision of facilities for transportation. Certainly the repair and maintenance of the transportation equipment is one of the necessary facilities in order that a motor carrier may engage in interstate commerce. This intent is further substantiated by Section 203(a)(19) of the Motor Carrier Act of 1935. This Section is limited to the definition of the terms used in said Act. Said Section 19 thereof defines the terms "services" and "transportation." Said terms include not only the actual vehicles operated by, for, or in the interest of a motor carrier, but also the facilities and property operated or controlled by a motor carrier irrespective of the ownership thereof. Certainly a service company is included as one of the facilities essential to the existence of a motor carrier.

After the decision rendered in the case of *Southland Company v. Bayley et al. and Richardson v. James Gibbons Co.*, 319 U. S. 44, there is little doubt as to when the Interstate Commerce Commission has the "power" predicated upon a finding of need, to regulate hours of service of employees engaged in activities affecting safety of operation of Interstate Carriers. Merely because the qualifications with respect to maximum hours and wages of employees have in the past been governed by the Fair

Labor Standards Act of 1938, this does not bar the Interstate Commerce Commission from superseding this regulation if they should determine that the need exists to do so. Therefore, the fact that the Interstate Commerce Commission has not regulated the hours of employment and wages of the employees here involved to date, does not bar them from now doing so.

If the Boutell Service Company is not exempt as a service establishment engaged in intrastate commerce, then the very facts which make it engaged in interstate commerce automatically subject it to the control of the Interstate Commerce Commission because its employees are engaged in work effecting the safety of operations.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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CARTON, GAULT & DAVISON,
Attorneys of Counsel for Appellants.

GLENN M. COULTER and
JACK NEWCOMBE,
Attorneys of Counsel for Appellants.

May 1945.

APPENDIX

The provisions of the Motor Carrier Act of 1935 (49 Stat. 543; 54 Stat. 919; 56 Stat. 300; 49 U.S.C.A. secs. 301 *et seq.*) to which reference is made are:

204(a) It shall be the duty of the Commission

(1) To regulate common carriers by motor vehicle as provided in this part and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*

202(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

203(a) (19) The "services" and "transportation" to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

The provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, sec. 201 *et seq.*) to which reference is made are:

13(a) The provisions of Section 6 and Section 7 of the Fair Labor Standards Act of 1938 shall not apply with respect to—

(2) Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

13(b) The provisions of Section 7 of the Fair Labor Standards Act of 1938 shall not apply with respect to—

(1) Any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935.

Section 7 of the Fair Labor Standards Act of 1938 provides:

"(a) No employer shall * * * employ any of his employees who are engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this Section;

(2) for a workweek longer than forty-two hours during the second year from such date; or

(3) for a workweek longer than forty hours after the expiration of the second year from such date;

unless such employee receives compensation for his employment in excess of the hours above specified at the rate of one and one-half times the regular rate at which he was employed."

No. 1266

In the Supreme Court of the United States

OCTOBER TERM, 1944

ANNA M. BOUTELL AND CARROLL M. BOUTELL, DOING BUSINESS AS F. J. BOUTELL SERVICE COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 20, 23–24) are not reported. The opinion of the circuit court of appeals (R. 38–42) is reported in 148 F. 2d 329.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 14, 1945 (R. 37). The

petition for a writ of certiorari was filed on May 14, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners' employees, who are engaged exclusively in repairing and maintaining vehicles of a single interstate motor carrier, are engaged in a "service establishment the greater part of whose * * * servicing is in intrastate commerce" within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act.

2. Whether employees of a commercial garage which is not a carrier but is engaged exclusively in repairing and maintaining vehicles of an interstate motor carrier, are "employee[s] with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 13 (a) (2) and 13 (b) (1) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, and Section 204 (a) of the Motor Carrier Act of 1935, c. 498, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*

The pertinent portions of the Fair Labor Standards Act read as follows:

> SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *.
>
> (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *.

The relevant provision of the Motor Carrier Act reads as follows:

> SEC. 204 (a). It shall be the duty of the Commission:
>
> (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

Similar provisions are made in Section 204 (a) (2) and 204 (a) (3) for the regulation of con-

tract and private carriers, respectively. Other provisions of the Motor Carrier Act referred to in this brief are printed in the Appendix.

STATEMENT

This suit was brought by the Administrator of the Wage and Hour Division to enjoin petitioners from violating the maximum hours provisions of the Fair Labor Standards Act (Section 7) (R. 2–5). Petitioners are members of a partnership doing business under the name of the F. J. Boutell Service Company. The partnership operates a place of business in the city of Toledo, Ohio, where it is engaged in the repair and maintenance of the motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the business involved in the instant case, although the members of the partnership are the sole stockholders of the Drive-Away Company (R. 23). Substantially all of the business of the Drive-Away Company has been transportation of goods in interstate commerce. Petitioners' employees involved in this action are mechanics engaged in greasing, repairing, servicing, and maintaining the transportation equipment owned and operated by the Drive-Away Company (R. 24).

The case came up for decision, upon the Administrator's motion for summary judgment on the pleadings, after petitioners had filed an

answer admitting that they were not paying overtime compensation in compliance with Section 7 of the Fair Labor Standards Act but asserting that they were exempt from such requirement. The district court held (1) that petitioners' place of business is not a retail or service establishment within the meaning of Section 13 (a) (2) of the Act "since the greater part of its servicing or selling is not in intrastate commerce and since it does not serve the general consuming public" (R. 24); and (2) that petitioners' employees are not employees of a "carrier" and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Act (*ibid.*). The circuit court of appeals affirmed (R. 37). It said that the claim to exemption as a service establishment "is disposed of by the finding of the court and the concession of the appellants that substantially all of the business of the Drive-Away Company is in interstate commerce" (R. 39–40), and, with respect to the claim of exemption under Section 13 (b) (1), that the wording and legislative history of the Motor Carrier Act and its administrative interpretation demonstrate that Congress did not intend to vest in the Interstate Commerce Commission jurisdiction over employees of other than carriers (R. 42).

ARGUMENT

1. As the circuit court of appeals ruled, the fact that the greater part of the work performed by petitioners is on transportation facilities used

in interstate commerce suffices to demonstrate the inapplicability of the exemption provided by Section 13 (a) (2). "Section 13 (a) (2) by its very terms exempts only those employees engaged in a retail or service establishment operating primarily in local commerce." *A. H. Phillips, Inc.* v. *Walling,* No. 608, this Term, slip opinion, p. 4. Since substantially all of the business of the carrier upon whose trucks petitioners' employees work is admittedly in interstate commerce (R. 24), the employees working on these trucks are clearly engaged in interstate commerce. *Overstreet* v. *North Shore Corp.,* 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Const.* Co., 318 U. S. 740. Employees so engaged in interstate commerce are not furnishing services "in intrastate commerce" within the meaning of the Section 13 (a) (2) exemption. See *McLeod* v. *Threlkeld,* 319 U. S. 491, 494, footnote 6; see also *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 107 (C. C. A. 9). The decision in *Martino* v. *Michigan Window Cleaning Co.,* 145 F. 2d 163 (C. C. A. 6), certiorari denied February 26, 1945, No. 849, this term, upon which petitioners particularly rely (Br. 14–16), is not contrary to this conclusion; in the *Martino* case, the court concluded that window cleaning was not interstate commerce or production of goods for commerce. Whatever the merit of that decision, the window-cleaners in that case, unlike the employees here

involved, were not "engaged in actual work upon the transportation facilities". *McLeod* v. *Threlkeld, supra.*

An additional reason for the inapplicability of the exemption, a ground relied upon by the district court, is that petitioners' truck repair shop is not a "service establishment" because its services are not offered to customers generally. It has been the uniform view of the courts that the term "service establishment", as used in this Section, refers to establishments which offer their services to customers generally. See *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, 107 (C. C. A. 9); *Fleming* v. *A. B. Kirschbaum Co.,* 124 F. 2d 567, 572 (C. C. A. 3), affirmed, 316 U. S. 517, 526; see also *Walling* v. *Consumers Co.,* 8 Wage Hour Rept. 350 (C. C. A. 7, 1945); *Bracey* v. *Luray,* 138 F. 2d 8 (C. C. A. 4); *Guess* v. *Montague,* 140 F. 2d 500 (C. C. A. 4); *Collins* v. *Kidd Dairy & Ice Co.,* 132 F. 2d 79 (C. C. A. 5). While there has been some divergency among the circuits with respect to the question whether the private or industrial character of the customers is material to the application of the exemption,[1] the instant case does not require determination of that controversial issue. For petitioners' establishment does not offer its services to either pri-

[1] This question is involved in *Roland Electrical Co.* v. *Walling,* pending on petition for certiorari, No. 1033, this Term, and the Government did not oppose granting the writ on this issue. See Memorandum for Respondent, pp. 7–8.

vate or industrial customers generally, but is operated exclusively for the purposes of a single business organization. The cases relied upon by petitioners (Br. 13–14) are not in point, as the establishments in all of those cases catered to various customers, although in a few instances the customers were largely commercial and industrial rather than private consumers.

2. Although the work performed by petitioners' employees may affect the safety of the operation of the motor vehicles in interstate transportation, they are not employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act. The court below correctly ruled that Section 204 of the Motor Carrier Act of 1935 was intended to give the Commission the power to establish hours of service for employees of motor *carriers only*. This construction is supported by the entire framework of the Motor Carrier Act, by the legislative history, and by the Interstate Commerce Commission's interpretation of its jurisdiction.

The terminology used throughout the Motor Carrier Act reflects a Congressional purpose to confine its operation to carriers. Section 204 (a) confers power upon the Commission "to regulate * * * carriers" and "to that end" to

establish maximum hours of service of employees. Section 202 (a), defining the scope of the Act, states that it applies to "transportation of passengers or property by motor carriers". Section 204 (a) (4a) speaks of "regulation by the Commission of interstate or foreign transportation by motor carriers." Section 204 (c) authorizes the Commission to "investigate whether any motor carrier" has failed to comply with the statute and to issue orders compelling such compliance. Finally, in Section 226,[2] the Commission is empowered to investigate and report the need for regulation of "maximum hours of service of employees *of all motor carriers and private carriers* of property by motor vehicle". [Italics supplied.][3]

When the amendment to paragraphs (1) and (2) of Section 204 (a), to include the words giving the Commission power to regulate the maximum hours of service of employees, was proposed, Senator Wheeler, chairman of the Committee on

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[2] This was originally Section 225 but was renumbered. 54 Stat. 929.

[3] In discussing Section 204 (a), Senator Wheeler, sponsor of the bill, stated that "the exercise of this power [conferred by Section 204 (a)] with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for *regulation of this kind* provided for in section 225." 79 Cong. Rec. 5652. [Italics supplied.] Section 204 (a) was evidently intended to grant the Commission regulatory powers over exactly the same matters as it was empowered to investigate in Section 226; that is, the "maximum hours of service of employees" in Section 204 (a) means "maximum hours of service of employees of all motor carriers," as explicitly stated in Section 226.

Interstate Commerce and sponsor of the bill, stated that the purpose of their inclusion was "to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of common and contract *carriers.*" 79 Cong. Rec. 5652. [Italics supplied.] Subparagraph (3), providing for regulation of private carriers, was similarly amended so as to give the Commission like authority with respect to "the employees of such *operators.*" 79 Cong. Rec. 5652. [Italics supplied.] See also S. Rep. No. 482, 74th Cong., 1st sess., p. 1. Congressional reports and debates in both Houses disclose that the purpose was to regulate motor carriers alone; there is no indication of any intent to regulate hours of workers employed by anyone else.*

* Representative Sadowski of the House Committee on Interstate Commerce, in discussing Section 204, said that "these provisions as laid down by the Commission must be observed by all motor carriers," and that the Committee "decided to leave maximum hours of service up to the rules of the Commission so that this new legislation would be flexible to meet all the labor situations among the various classes of motor-carrier operators to be regulated," 79 Cong. Rec. 12,205. Representative Pettengill, quoting Commissioner Joseph B. Eastman, generally credited with the authorship of the Motor Carrier Act (see *United States* v. *American Trucking Assns.*, 310 U. S. 534, 538), stated: "The bill * * * gives the Commission authority to prescribe maximum hours of service for the employees of common carriers, contract carriers, and private carriers of property." 79 Cong. Rec. 12,229. To the same effect see the remarks of Senator Couzens, 79 Cong. Rec. 5660, and of Representatives Wadsworth and Crawford, 79 Cong. Rec. 12,198.

That the congressional intent was so limited is confirmed by the legislative history of Section 13 (b) (1) of the Fair Labor Standards Act. The parent of the present Section first appeared as an amendment to S. 2475, 75th Cong., 1st sess., proposed by Senator Moore, to amend the definition of "employee" in the Act so that its maximum hours provisions would not apply to "any employee of any common carrier by motor vehicle subject to the qualifications and maximum hours of service provisions of the Motor Carrier Act, 1935, provided that the wage provisions of this Act shall apply." H. Rep. No. 1452, 75th Cong., 1st sess., p. 11. This language was unchanged through five drafts of the bill, but in the House Committee print of December 14, 1937, 75th Cong., 2d sess., the wording was changed to "any employee with respect to whom the Interstate Commerce Commission has power to prescribe maximum hours of service. * * * *Provided, however,* That the wage provision shall apply to employees of *such carriers* by motor vehicle." [Italics supplied.] That the altered wording was not intended to extend the hours exemption to workers other than employees of carriers is clear from the retention of the proviso. Section 13 (b) (1) appeared for the first time in the House Committee print of S. 2475, April 15, 1938, 75th Cong., 3d sess., p. 58. The House report indicates that the change in language occurred in the course of adopting a new drafting technique designed to

simplify the Act by placing "all of the exemptions in a single exemption section", and that there was no intent to change the original meaning of the exemption. H. Rep. No. 2182, 75th Cong., 3d sess., p. 13.[5]

The Interstate Commerce Commission has never asserted jurisdiction over any employees except those of carriers, and has stated specifically that it has no jurisdiction over employees working in a commercial garage such as that here involved: "By far the larger proportion of the carriers subject to our jurisdiction operate less than 10 vehicles and do not employ mechanics to repair their vehicles, but on the contrary have such work done in commercial garages. *We have, of course, no jurisdiction over employees working in commercial garages.*" [Italics supplied.] *Ex Parte No. MC-2, Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, 132; and see *Ex Parte No. MC-3, Motor Carrier Safety Regulations—Private Carriers*, 23 M. C. C. 1, 7–8, 9. See also *Dixie Ohio Express Co.*, 17 M. C. C. 735; *Columbia Terminals Co.*, 18 M. C. C.

[5] "Section 11 of the committee amendment contains the exemptions from the provisions of the act. As stated above, exemptions were made in the Senate bill by the device of excluding the individuals to be exempted from the definition of 'employee.' This device seriously complicated the child-labor provisions of the act, inasmuch as the term 'employee' was used in those provisions. Hence the committee has adopted the device of placing all of the exemptions in a single exemption section."

662; *U-Drive-It Co. of Pa. Inc.*, 23 M. C. C. 799; *C. E. Hall and Sons*, 24 M. C. C. 33.*

It is true that petitioners' garage employees work only on trucks operated by a carrier corporation whose stock is owned by petitioners. If petitioners had chosen to do so, they could have conducted their motor transportation business and their garage business as a single enterprise and thus brought their garage employees within the jurisdiction of the Interstate Commerce Commission and therefore within the exemption created by Section 13 (b) (1) of the Fair Labor Standards Act. The record does not show petitioners' reasons or motives for organizing their garage and motor transportation as two separate businesses. Presumably this was done in order to secure advantages which petitioners would not

* The case of *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y., 1943) principally relied on by petitioners (Br. 17–18), does not support the contention that employees of noncarriers are also within the exemption. As petitioners point out, the employer there, in contrast to the employer in the instant case, owned the trucks on which the employees worked (Br. 18), and the opinion shows that the employer's operations and affiliations with various shippers and carriers were quite complicated. Although the basis of its ruling that the exemption applied to the mechanics who worked on the trucks is not entirely clear, the court appears to have assumed that the employer was some kind of "carrier" within the scope of the Motor Carrier Act. See 6 Wage Hour Rept. at 679. See also the subsequent ruling of the Interstate Commerce Commission holding that the employer involved in that case was a contract carrier with respect to its operations of furnishing trucks *with drivers* to shippers. *John J. Casale, Inc.*, 44 M. C. C. 45, 60.

enjoy if these activities were operated as a single business. It is therefore entirely proper that the separate organization which excludes the garage employees from regulation by the Commission should also remove them from the scope of the exemption provided by the Fair Labor Standards Act.[7]

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

HUGH B. COX,
Acting Solicitor General.

DOUGLAS B. MAGGS,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
United States Department of Labor.

JUNE 1945.

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[7] Interpretative Bulletin No. 9, referred to by petitioners (Br. 20–21), applies to employees of wholesale establishments which, as private carriers covered by Section 204 (c) (3) of the Motor Carrier Act of 1935, operate their own vehicles. It is concerned only with the policy to be applied in determining whether, under the Motor Carrier Act, such employees are engaged in interstate commerce (cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564), and does not deal with a situation, like that here involved, in which the employees do not work for a carrier.

APPENDIX

The provisions of the Motor Carrier Act of 1935 (49 Stat. 543; 54 Stat. 919; 56 Stat. 300; 49 U. S. C. 301, *et seq.*), to which reference is made, are:

SEC. 202 (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

* * * * * *

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

* * * * *

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water-carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight for-

warder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

SEC. 203 (a) As used in this part—

* * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is

the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 204 (a). It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 (c); 205; 220; 221; 222 (a), (b), (d), (f), and (g); and 224.

* * * * *

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon any revocation of any such certificate, the

Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this part beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this part as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Applications under this subparagraph shall be made in writing to the Commission, verified under

oath, and shall be in such form and contain such information as the Commission shall by regulations require.

* * * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * * *

SEC. 226. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter.

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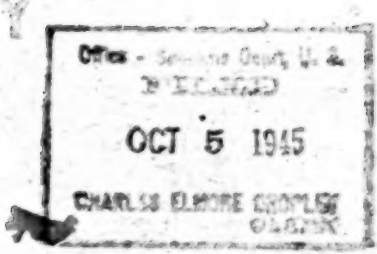

No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1945

ANNA M. BOUTELL AND CARROLL M. BOUTELL, DOING BUSINESS AS F. J. BOUTELL SERVICE COMPANY, PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 16, 18–20) are not reported. The opinion of the circuit court of appeals (R. 28–32) is reported in 148 F. 2d 329.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 14, 1945 (R. 28). The

petition for a writ of certiorari was filed on May 14, 1945, and granted June 18, 1945 (R. 33). The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioners' employees, who are engaged exclusively in repairing and maintaining vehicles of a single interstate motor carrier, are engaged in a "service establishment the greater part of whose * * * servicing is in intrastate commerce" within the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act.

2. Whether employees of a commercial garage, which is not a carrier but is engaged exclusively in repairing and maintaining vehicles of an interstate motor carrier, are "employee[s] with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act.

STATUTES INVOLVED

The statutory provisions involved are Sections 13 (a) (2) and 13 (b) (1) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29

U. S. C., sec. 201 *et seq.*, and Section 204 (a) of the Motor Carrier Act of 1935, c. 498, 49 Stat. 543, as amended, 49 U. S. C. 301, *et seq.*

The pertinent portions of the Fair Labor Standards Act read as follows:

> SEC. 13 (a). The provision of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *.
>
> (b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *.

The relevant provision of the Motor Carrier Act read as follows:

> SEC. 204 (a). It shall be the duty of the Commission—
>
> (1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

Similar provisions are made in Section 204 (a) (2) and 204 (a) (3) for the regulation of contract and private carriers, respectively. Other provisions of the Motor Carrier Act referred to in this brief are printed in the Appendix.

STATEMENT

This suit was brought by the Administrator of the Wage and Hour Division to enjoin petitioners from violating the maximum hours provisions of the Fair Labor Standards Act (Sec. 7) (R. 2–4). Petitioners are members of a partnership doing business under the name of the F. J. Boutell Service Company. The partnership operates a place of business in the city of Toledo, Ohio, where it is engaged in the repair and maintenance of the motor transportation equipment owned and operated by the F. J. Boutell Drive-Away Company. The F. J. Boutell Drive-Away Company is a Michigan corporation, and is an entity separate and distinct from the business involved in the instant case, although the members of the partnership are the sole stockholders of the Drive-Away Company (R. 18–19). Substantially all of the business of the Drive-Away Company has been transportation of goods in interstate commerce. Petitioners' employees involved in this action are mechanics engaged in greasing, repairing, servicing, and maintaining the transportation equipment owned and operated by the Drive-Away Company (R. 19).

The case came up for decision, upon the Administrator's motion for summary judgment on the pleadings, after petitioners had filed an answer admitting that they were not paying overtime compensation in compliance with Section 7 of the Fair Labor Standards Act but asserting that they were exempt from such requirement. The district court held (1) that petitioners' place of business is not a retail or service establishment within the meaning of Section 13 (a) (2) of the Act "since the greater part of its servicing or selling is not in intrastate commerce and since it does not serve the general consuming public" (R. 20); and (2) that petitioners' employees are not employees of a "carrier" and are therefore not subject to the exemption provided in Section 13 (b) (1) of the Act (R. 19–20). The circuit court of appeals affirmed (R. 28). It said that the claim to exemption as a service establishment "is disposed of by the finding of the court and the concession of the appellants that substantially all of the business of the Drive-Away Company is in interstate commerce" (R. 30), and, with respect to the claim of exemption under Section 13 (b) (1), that the wording and legislative history of the Motor Carrier Act and its administrative interpretation demonstrate that Congress did not intend to vest in the Interstate Commerce Commission jurisdiction over employees of other than carriers (R. 32).

SUMMARY OF ARGUMENT

I

An establishment engaged in servicing and repairing the transportation facilities of an interstate carrier is not a "retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of the exemption provided in Section 13 (a) (2). Unlike the type of establishments contemplated by the exemption, petitioner does not offer its services to the general local consuming public but is operated exclusively for the purposes of a single admittedly interstate business. Furthermore, under the decisions of this Court, employees engaged in the greasing, repairing and servicing of transportation facilities and equipment for use in interstate transportation are engaged "in interstate commerce." And this Court has indicated that employees so engaged are not furnishing service "in intrastate commerce" within the meaning of the 13 (a) (2) exemption. *McLeod* v. *Threlkeld*, 319 U. S. 491.

II

Petitioners' employees are not exempt under Section 13 (b) (1) of the Act, which exempts employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935," because the Commis-

sion's power under that section is limited to employees of carriers and petitioners are not carriers. The entire framework of the Motor Carrier Act, its legislative history and the Interstate Commerce Commission's interpretation of its own jurisdiction, all support the view that Section 204 (a) does not confer jurisdiction over employees of others than carriers. The Interstate Commerce Commission has specifically ruled that it has no jurisdiction over employees in a commercial garage such as that here involved. The legislative history of the Fair Labor Standards Act and its administrative interpretation are likewise contrary to the construction advanced by petitioners.

The fact that the activities of petitioner's employees are closely related to a carrier's operations does not suffice to bring them within the Commission's regulatory power. Likewise, it is immaterial that petitioners' garage employees work only on trucks operated by a carrier corporation whose stock is owned by petitioners. Presumably, petitioners considered it advantageous to avoid the risks of a combined carrier-garage business and it is therefore entirely proper that they be required to assume the burdens of the form of organization they chose. It is wholly consistent with the purposes of the two statutes that the separate organization which excludes regulation of employees' hours by the Commission should have the effect of subjecting the employer to the overtime requirements of the Fair Labor Standards Act.

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ARGUMENT

I

PETITIONERS' EMPLOYEES ARE NOT WITHIN THE EXEMPTION PROVIDED BY SECTION 13 (A) (2) OF THE FAIR LABOR STANDARDS ACT

Section 13 (a) (2) of the Fair Labor Standards Act provides that the minimum wage and overtime provisions of the Act shall not apply to—

> * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.

A. As more fully developed in the Government's brief in *Roland Electrical Co.* v. *Walling*, this Term, No. 45 (br., pp. 17–39), Section 13 (a) (2) was designed to exempt "those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store" (*Phillips* v. *Walling*, 324 U. S. 490, 497), and "service" establishments regularly engaged in performing services similar to local retailing, like barber shops, filling stations, restaurants and laundries—all establishments which cater to the local consuming public generally. There is no evidence in the legislative history of any intent to exempt servicing which has no resemblance to local retailing but is integrated with and performed exclusively for an admittedly interstate business. On the contrary, the context

of the exemption as well as the statutory policy as a whole and the legislative history, far from showing that petitioners' business is "plainly and unmistakably within [the] terms and spirit" of the exemption (*Phillips* v. *Walling*, 324 U. S. 490, 493), plainly negative any such intent. The cases relied upon by petitioners (pet., pp. 11–15) are not in point as none of them involved an establishment integrated with a single interstate business.[1]

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[1] The cases of *Ellinger* v. *Goodyear Tire & Rubber Co.*, 40 F. Supp. 626 (N. D. Iowa) and *Bynum* v. *Firestone Tire & Rubber Co.*, 177 S. W. (2d) 20 (C. A. Tenn.) involved ordinary filling stations furnishing tire, greasing, battery, oil, gasoline, polishing, and similar services to individual motor vehicles, most of which were apparently passenger cars. Such service stations which are open to the public generally would ordinarly be within Sec. 13 (a) (2), and in fact are frequently mentioned by the courts as illustrative of the kind of establishment falling within the exemption.

The case of *Walling* v. *Casale*, 51 F. Supp. 520 (S. D. N. Y.), opposes rather than supports petitioners' position. It held that defendant, who leased trucks to manufacturers and who serviced those trucks, was engaged in the "production of goods for commerce" within Sec. 3 (j) of the Act and consequently could not be considered a "service establishment." Petitioners rely upon a dictum in the opinion to the effect that if the trucks were owned and operated by the manufacturers who used them and "if defendant's activities * * * were limited to greasing, repairing and servicing the same, the defense, founded on [Sec. 13 (a) (12)] * * * might be strong enough to bring about a dismissal of the bill." 51 F. Supp. at 526. Whatever weight this dictum might carry with respect to an establishment serving a variety of trucking companies (there were some 60-odd customers who leased the trucks in the *Casale* case), it plainly has no application to an establishment devoted to serving a single interstate transportation company.

Petitioners' establishment has even less resemblance to the type of establishment contemplated by the exemption than that involved in the *Roland Electrical* case, since it does not offer its services to any portion of the general public, but is operated exclusively for the purposes of a single business organization.

B. Both courts below ruled that petitioners failed to satisfy the condition that "the greater part of * * * [its] servicing [be] in intrastate commerce" (R. 20, 30). Since substantially all of the business of the Drive-Away Company, upon whose trucks petitioners' employees work, is admittedly in interstate commerce (R. 19), the employees servicing these trucks are clearly engaged in interstate commerce within the coverage provisions of the Act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125 (repairing road); *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U. S. 740 (repairing bridge); *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572,575 (rate clerk of trucking company); *Hertz Drivurself Stations* v. *United States*, not yet officially reported but printed in 8 Wage Hour Rept. 900 (C. C. A. 8, 1945) (servicing automobiles).

"In interstate commerce," as used in the Fair Labor Standards Act, is as broad as the same phrase in the Federal Employer's Liability Act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 128–129; *McLeod* v. *Threlkeld*, 319 U. S. 491, 495.

This Court has held both acts applicable to work "so closely related to [interstate] commerce as to be in practice and in legal contemplation a part of it." *Pedersen* v. *Delaware L. & W. R. Co.*, 229 U. S. 146, 151; *Overstreet* v. *North Shore Corp.*, *supra*, at 129. Under the Federal Employers' Liability Act, the work of employees engaged in keeping in a proper state of repair and maintenance such instrumentalities as "tracks and bridges" and "engines and cars" for use in interstate commerce was held to be performed in such commerce. See *Pederson* v. *Delaware L. & W. R. Co.*, 229 U. S., at 151; *N. Y. Central R. Co.* v. *Marcone*, 281 U. S. 345, 350. The "repair and maintenance" and the "greasing, repairing, servicing and maintaining" of the transportation equipment in the instant case (R. 19) is similar to the lubricating of engines while in the round house for inspection (see *New York Central R. Co.* v. *Marcone, supra*), and not to the repairing of locomotives withdrawn from service (cf. *N. Y. N. H. & H. R. Co.* v. *Bezue*, 284 U. S. 415).[2]

This Court in *McLeod* v. *Threlkeld* indicated

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[2] In *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 556, the Court declared even with respect to railroad shop employees engaged in making repairs on locomotives and cars withdrawn from service for long periods that "the activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them."

that employees so engaged are not furnishing service in intrastate commerce within the meaning of the 13 (a) (2) exemption.[3] See also *Phillips* v. *Walling*, where this Court emphasized that "Section 13 (a) (2) by its very terms exempts only those employees engaged in a retail or service establishment operating primarily in local commerce" (324 U. S. 490, 496).[4]

Accordingly, petitioners' business does not meet the qualifications for exemption under Section 13 (a) (2) of the Act.

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[3] 319 U. S. 491, 494, fn. 6: "The contention that the work of the employee is covered by the exemption of Sec. 13 (a) (2)—'any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce'—seems without significance. If the work is in interstate commerce, the exemption does not apply. Compare *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101, 106 *et seq.*; *Hanson* v. *Lagerstrom*, 133 F. 2d 120." See also *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Walling* v. *Roland Electrical Co.*, 146 F. 2d 745 (C. C. A. 4), pending on writ of certiorari, No. 45 this Term.

[4] In *Martino* v. *Michigan Window Cleaning Co.*, 145 F. 2d 163 (C. C. A. 6), pending on writ of certiorari, No. 21, this Term, upon which petitioners particularly rely (br., pp. 14–16), the court concluded that window cleaning was not interstate commerce or production of goods for commerce and that the window cleaning company was probably exempt as a "service establishment." Whatever the merit of that decision (cf. the Government's brief *amicus* in the *Martino* case), the window cleaners in that case, unlike the employees here involved, were not "engaged in actual work upon [interstate] transportation facilities." *McLeod* v. *Threlkeld*, *supra*.

II

PETITIONERS' EMPLOYEES ARE NOT "EMPLOYEE[S] WITH RESPECT TO WHOM THE INTERSTATE COMMERCE COMMISSION HAS POWER TO ESTABLISH QUALIFICATIONS AND MAXIMUM HOURS OF SERVICE PURSUANT TO THE PROVISIONS OF SECTION 204 OF THE MOTOR CARRIER ACT OF 1935" AND ACCORDINGLY ARE NOT WITHIN THE EXEMPTION PROVIDED BY SECTION 13 (B) (1) OF THE FAIR LABOR STANDARDS ACT

Section 13 (b) (1) of the Fair Labor Standards Act provides that its overtime pay provisions shall not apply to—

> * * * any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 * * *.

Although the work performed by petitioners' employees may affect the safety of operation of motor vehicles in interstate transportation, they are not employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935" within the exemption provided by Section 13 (b) (1) of the Fair Labor Standards Act. For concededly petitioners are not carriers (pet. pp. 18, 22–23). The court below correctly ruled that Section 204 of the Motor Carrier Act of 1935 was intended to give the Commission the power to establish hours

of service for employees of motor carriers only.[5] The entire framework of the Motor Carrier Act, its legislative history, and the Interstate Commerce Commission's interpretation of its jurisdiction, all support the view of the court below that Section 204 (a) does not confer jurisdiction over employees of others than carriers. The legislative history and policy of the Fair Labor Standards Act and its administrative construction confirm the accuracy of this view.

The terminology used throughout the Motor Carrier Act reflects a Congressional purpose to confine its operations to carriers. Section 204 (a) (1) (2) and (3) confer power upon the Commission "to regulate * * * *carriers*" and "to that end" to establish maximum hours of service of employees. Section 202 (a), defining the scope of the Act, states that it applies to "transportation of passengers or property *by motor carriers.*" Section 204 (a) (4a) speaks of "regulation by the Commission of transportation *by motor carriers* engaged in interstate or foreign commerce." Section 204 (c) authorizes the Commission to "investigate whether any motor carrier" has failed to comply with the statute and to issue orders compelling such compliance. Finally, in Section 226,[6]

[5] See *United States* v. *N. E. Rosenblum Truck Lines*, 315 U. S. 50; cf. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422.

[6] This was originally Sec. 225 but was renumbered. 54 Stat. 929.

the Commission is empowered to investigate and report the need for regulation of "maximum hours of service of employees *of all motor carriers and private carriers* of property by motor vehicle."[7] [Italics supplied.]

When the amendment to paragraphs (1) and (2) of Section 204 (a), to include the words giving the Commission power to regulate the maximum hours of service of employees, was proposed, Senator Wheeler, chairman of the Committee on Interstate Commerce and sponsor of the bill, stated that the purpose of their inclusion was "to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of common and contract *carriers.*" 79 Cong. Rec. 5652. [Italics supplied.] Subparagraph (3), providing for regulation of private carriers, was similarly amended so as to give the Commission like authority with respect to "the

[7] In discussing Sec. 204 (a), Senator Wheeler, sponsor of the bill, stated that "the exercise of this power [conferred by Sec. 204 (a)] with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for *regulation of this kind* provided for in section 225." 79 Cong. Rec. 5652. [Italics supplied.] This indicates that Sec. 204 (a) was intended to grant the Commission regulatory powers over exactly the same matters as it was empowered to investigate in Sec. 226; that is, the "maximum hours of service of employees" in Sec. 204 (a) means "maximum hours of service of employees of all motor carriers," as explicitly stated in Sec. 226.

employees of such *operators.*" 79 Cong. Rec. 5652. [Italics supplied.] See also S. Rep. No. 482, 74th Cong., 1st sess., p. 1. Congressional reports and debates in both Houses disclose that the purpose was to regulate motor carriers alone; there is no indication of any intent to regulate hours of workers employed by anyone else.[8]

That the congressional intent was so limited is confirmed by the legislative history of Section 13 (b) (1) of the Fair Labor Standards Act. The parent of the present section first appeared as an amendment to S. 2475, 75th Cong., 1st sess., proposed by Senator Moore, to amend the definition of "employee" in the Act so that its maximum hours provisions would not apply to "any employee of any common carrier by motor vehicle

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[8] Representative Sadowski of the House Committee on Interstate Commerce, in discussing Sec. 204, said that "these provisions as laid down by the Commission must be observed by all motor carriers," and that the Committee "decided to leave maximum hours of service up to the rules of the Commission so that this new legislation would be flexible to meet all the labor situations among the various classes of motor-carrier operators to be regulated." 79 Cong. Rec. 12,205. Representative Pettengill, quoting Commissioner Joseph B. Eastman, generally credited with the authorship of the Motor Carrier Act (see *United States* v. *American Trucking Assns.*, 310 U. S. 534, 538), stated: "The bill * * * gives the Commission authority to prescribe maximum hours of service for the employees of common carriers, contract carriers, and private carriers of property." 79 Cong. Rec. 12,229. To the same effect see the remarks of Senator Couzens, 79 Cong. Rec. 5660, and of Representatives Wadsworth and Crawford, 79 Cong. Rec. 12,198.

subject to the qualifications and maximum hours of service provisions of the Motor Carrier Act, 1935, provided that the wage provisions of this Act shall apply." H. Rep. No. 1452, 75th Cong., 1st sess., p. 11. This language was unchanged through five drafts of the bill, but in the House Committee print of December 14, 1937, 75th Cong., 2d sess., the wording was changed to "any employee with respect to whom the Interstate Commerce Commission has power to prescribe maximum hours of service. * * * *Provided, however,* That the wage provision shall apply to employees of *such carriers* by motor vehicle." [Italics supplied.] That the altered wording was not intended to extend the hours exemption to workers other than employees of carriers is clear from the retention of the proviso. Section 13 (b) (1) in its present form appeared for the first time in the House Committee print of S. 2475, April 15, 1938, 75th Cong., 3d sess., p. 58. The House report indicates that the change in language occurred in the course of adopting a new drafting technique designed to simplify the Act by placing "all of the exemptions in a single exemption section," and that there was no intent to change the original meaning of the exemption. H. Rep. No. 2182, 75th Cong., 3d sess., p. 13.[9]

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[9] "Section 11 of the committee amendment contains the exemptions from the provisions of the act. As stated above, exemptions were made in the Senate bill by the device of excluding the individuals to be exempted from the definition of

The Interstate Commerce Commission has never asserted jurisdiction over the hours of any employees except those of carriers, and has stated specifically that it has no jurisdiction over any employees working in a commercial garage such as that here involved. "By far the larger proportion of the carriers subject to our jurisdiction operate less than 10 vehicles and do not employ mechanics to repair their vehicles, but on the contrary have such work done in commercial garages. *We have, of course, no jurisdiction over employees working in commercial garages.*" [Italics supplied.] *Ex Parte No. MC–2, Maximum Hours of Service of Motor Carrier Employees,* 28 M. C. C. 125, 132; see also *Ex Parte No. MC–3, Motor Carrier Safety Regulations—Private Carriers,* 23 M. C. C. 1, 7–8, 9; *U-Drive-It Co. of Pennsylvania, Inc.* 23 M. C. C. 799; *C. E. Hall & Sons,* 24 M. C. C. 33.

Nothing in the *American Trucking Assns.* case, 310 U. S. 534, or in the decision of *Southland Gasoline Co.* v. *Bayley,* 319 U. S. 44, supports petitioners' contention that the exemption extends to all workers whose work affects safety of operation regardless of whether they are employed by a carrier or a non-carrier (cf. pet., pp. 22–23). On the contrary, both opinions refer throughout

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'employee.' This device seriously complicated the child-labor provisions of the act, inasmuch as the term 'employee' was used in those provisions. Hence the committee has adopted the device of placing all of the exemptions in a single exemption section."

to employees of "carriers" and "motor vehicle operators." 310 U. S. at 553; 319 U. S. at 48–49.[10]

The fact that the activities of the non-carrier are closely related to a carrier's operations and would, if carried on by the carrier, be subject to the jurisdiction of the Interstate Commerce Commission, does not suffice to bring the non-carrier's employees within the Interstate Commerce Commission's power. In construing other provisions of the Motor Carrier Act, this Court, as well as the Interstate Commerce Commission, has ruled that a person engaged in performing services exclusively for a carrier or carriers does not thereby himself become a carrier subject to

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[10] Nor does the case of *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y., 1943), principally relied on by petitioners (br., pp. 17–18), lend any support to the contention that employees of non-carriers are also within the exemption. As petitioners point out, the employer there, in contrast to the employer in the instant case, owned the trucks on which the employees worked (br., p. 18), and the opinion shows that the employer's operations and affiliations with various shippers and carriers were quite complicated. Although the basis of its ruling that the exemption applied to the mechanics who worked on the trucks is not entirely clear, the court appears to have assumed that the employer was some kind of "carrier" within the scope of the Motor Carrier Act. See 6 Wage Hour Rept. at 679. See also the subsequent ruling of the Interstate Commerce Commission holding that the employer involved in that case was a contract carrier with respect to its operations of furnishing trucks *with drivers* to shippers. *John J. Casale, Inc.*, 44 M. C. C. 45, 60. Petitioner does not furnish trucks with drivers but simply performs the maintenance and repair work for trucks owned and operated by another.

the jurisdiction of the Commission. See *United States* v. *N. E. Rosenblum Truck Lines*, 315 U. S. 50, where a person engaged in hauling freight, "principally for a single common carrier" (p. 51) was held not to qualify as a "carrier" within the meaning of the Motor Carrier Act, but to be "free to engage in such operations without securing the authorization of the Commission" (at 56). See also *Smythe Contract Carrier Application*, 22 M. C. C. 726, holding that an applicant whose vehicles were leased to and used exclusively in the service of a cartage company (of which applicant was president) was not a "carrier" and was "not performing any service for which authority is necessary under the act" (at 728).

Likewise, it is immaterial that petitioners' garage employees work only on trucks operated by a carrier corporation whose stock is owned by petitioners. Petitioners admit that "the F. J. Boutell Service Company is a separate and distinct entity from the F. J. Boutell Drive-Away Company" (Pet. pp. 14, 16). It is true that petitioners, had they chosen to do so, could have conducted their motor transportation business and their garage business as a single enterprise, and thus brought their garage employees within the jurisdiction of the Interstate Commerce Commission and therefore within the exemption created by Section 13 (b) (1) of the Fair Labor Standards Act. The record does not show petitioners' reasons or motives for organizing their garage and motor transportation as two separate businesses.

Presumably this was done in order to secure advantages which petitioners would not enjoy if these activities were operated as a single business. They "considered it advantageous to avoid the risks" of a single combined carrier-garage organization and "now must bear the burdens" of the form of organization they chose. See *Gray* v. *Powell*, 314 U. S. 402, 414. "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan" (*ibid.*). See also *Higgins* v. *Smith*, 308 U. S. 473, 477. It is therefore entirely proper, and also wholly consistent with the purposes of the two statutes, that the separate organization which excludes the garage employees' hours from regulation by the Commission should have the effect of subjecting such employees to the overtime provisions of the Fair Labor Standards Act.

The construction advanced by petitioners not only would conflict with the Congressional intent as shown by the legislative history, but would be contrary to the "interpretation of the two administrative agencies concerned with its interpretation, the Interstate Commerce Commission and the Wage and Hour Division * * *." See *United States* v. *American Trucking Assns.*, 310 U. S. 534, 544, 545. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" 310 U. S. at 544. The administrative interpretations are entitled to particular

weight "where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress." 310 U. S. at 549.

"In the face of this course of legislation, coupled with the supporting interpretation of the two administrative agencies concerned with its interpretation" (see *United States* v. *American Trucking Assns., supra,* at 545) it cannot be said that petitioners' employees are "plainly and unmistakably within [the] terms and spirit" of the 13 (b) (1) exemption (see *Phillips* v. *Walling,* 324 U. S. 490, 493).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX

The provisions of the Motor Carrier Act of 1935 (49 Stat. 543; 54 Stat. 919; 56 Stat. 300; 49 U. S. C. secs. 301 et seq.) to which reference is made are:

> SEC. 202 (a). The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.
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> * * * * *
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> (c). Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
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> * * * * *
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> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part 1, an express company subject to part 1, a motor carrier subject to this part, a water-carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection,

or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

SEC. 203 (a). As used in this part—

* * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by mototr vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part 1, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part 1.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of prop-

erty by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * *

SEC. 204 (a). It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements

are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of sections 204 (c); 205; 220; 221; 222 (a), (b), (d), (f), and (g); and 224.

* * * * *

(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Com-

mission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in interstate or foreign commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption shall be denied, and no order of revocation shall be issued, under this subparagraph, except after reasonable opportunity for hearing to interested parties. Where an application is made in good faith for the exemption of a motor carrier under this subparagraph, accompanied by a certificate of a State board of the State in which the operations of such carrier are carried on stating that in the opinion of such board such carrier is entitled to a certificate of exemption under this subparagraph, such carrier shall be exempt from the provisions of this part beginning with the sixtieth day following the making of such application to the Commission unless prior to such time the Commission shall have by order denied such application, and such exemption shall be effective until such time as the Commission, after such sixtieth day, may by order deny such application or may by order revoke all or any part thereof as hereinbefore authorized. In any case where a motor carrier has become exempt from the provisions of this part as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption. Ap-

plications under this subparagraph shall be made in writing to the Commission, verified under oath, and shall be in such form and contain such information as the Commission shall by regulations require.

* * * * *

(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

* * * * *

SEC. 226. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter.

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1945.

Anna M. Boutell and Carroll M. Boutell, Doing Business as F. J. Boutell Service Company, Petitioners,

vs.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 25, 1946.]

Mr. Justice Burton delivered the opinion of the Court.

This suit was brought in the District Court of the United States for the Eastern District of Michigan, by the Administrator of the Wage and Hour Division, United States Department of Labor, to enjoin petitioners from violating the maximum hours provisions[1] of the Fair Labor Standards Act of 1938. 52 Stat. 1060, 29 U. S. C. § 201, *et seq.*

Petitioners are two of four partners doing business as F. J. Boutell Service Company, the other two not being subject to the jurisdiction of the District Court. The four partners are the sole stockholders of the F. J. Boutell Drive-Away Company, a Michigan corporation, engaged in the transportation of automobiles and army equipment in interstate commerce.

The employees of the Service Company involved in this suit are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by

[1] "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U. S. C. §207(a).

the Drive-Away Company. The parties have stipulated and the trial court has found that the Service Company is engaged exclusively in rendering such service to the Drive-Away Company and such corporation "is an entity separate and distinct from" the Service Company.

The case presents two questions: (1) whether the employees of the Service Company are "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of the exemption clause, § 13(a)(2)[2]; and (2) whether they come within the exemption clause, § 13(b)(1), which exempts from § 7[3] of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204[4] of the Motor Carrier Act, 1935." 52 Stat. 1068, 29 U. S. C. § 213(b)(1). The District Court ruled against petitioners on both questions and granted the injunction sought by the Administrator. The Circuit Court of Appeals affirmed on both grounds. 148 F. 2d 329. We agree with those conclusions.

The amended findings of fact agreed to by the parties include the statement that the petitioners' employees "involved in this proceeding are mechanics engaged in greasing, repairing, servicing and maintaining the transportation equipment owned and operated by the F. J. Boutell Drive-Away Company. . . ."

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[2] "SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; . . . ." 52 Stat. 1067, 29 U. S. C. § 213(a)(2).

[3] See note 1 *supra.*

[4] "SEC. 204(a) It shall be the duty of the Commission—

"(1) *To regulate common carriers* by motor vehicle as provided in this part, *and to that end* the Commission may *establish* reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and *maximum hours of service of employees*, and safety of operation and equipment.

"(2) *To regulate contract carriers* by motor vehicle as provided in this part, *and to that end* the Commission may *establish* reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and *maximum hours of service of employees*, and safety of operation and equipment.

"(3) *To establish for private carriers* of property by motor vehicle, if need therefor is found, *reasonable requirements to promote safety of operation, and to that end prescribe* qualifications and *maximum hours of service of employees*, and standards of equipment. . . ." (Italics supplied.) 49 Stat. 546, 49 U. S. C. § 304(a)(1)(2)(3).

No claim is made that these employees are not engaged in interstate commerce within the meaning of § 7 of the Fair Labor Standards Act. They are well within the requirement that they be "actually in or so closely related to the movement of the commerce as to be a part of it." *McLeod* v. *Threlkeld*, 319 U. S. 491, 497.[5]

In answer to the first question, the record shows that these employees do not come within the exemption stated in § 13(a)(2). This is so because their employer, the Service Company, supplies its services, including their services, exclusively to the Drive-Away Company which in turn uses those services in interstate commerce. The Drive-Away Company does not use their services for its own purposes as an ultimate consumer, beyond the end of the flow of goods in interstate commerce. Accordingly, the employees of the Service Company are not engaged in a retail or service establishment within the meaning of § 13(a)(2) as interpreted in *Roland Electrical Co.* v. *Walling*, No. 45, decided Jan. 28, 1946, and *Martino* v. *Michigan Window Cleaning Co.*, No. 21, decided Feb. 4, 1946. Furthermore, substantially all of the servicing done by the Service Company is thus done in interstate commerce, whereas § 13(a)(2) requires the greater part of it to be done in intrastate commerce if the employees rendering it are to be exempted under that provision.

The question whether the employees of the Service Company are to be exempted by virtue of § 13(b)(1) turns upon whether the Interstate Commerce Commission has the "power to establish" maximum hours of service for them under § 204(a)(1)(2) or (3) of the Motor Carrier Act, 1935[6], now officially cited as Part II of the Interstate Commerce Act, 54 Stat. 919, 49 U. S. C. § 301, *et seq.* Whatever may be the precise scope of the Commission's "power to establish" hours of service, we hold that the Commission does not have that power over the men here concerned because the Commission's jurisdiction is limited to employees of "carriers" and the record here shows that the men in question

[5] Overstreet *v.* North Shore Corp., 318 U. S. 120, 130; Overnight Motor Co. *v.* Missel, 316 U. S. 572, 574. See also under the Federal Employers' Liability Act, New York Cent. R. Co. *v.* Marcone, 281 U. S. 345, 349; Pedersen *v.* Del., Lack. & West. R. R., 229 U. S. 146, 150; New York, New Haven & Hartford Railroad Co. *v.* Walsh, 223 U. S. 1, 6. Compare Shanks *v.* Del., Lack. & West. R. R., 239 U. S. 556, 560.

[6] See note 4 *supra*.

are employees of the Service Company, which is not a carrier, rather than of the Drive-Away Company, which is a carrier. This is true although the work these employees do is all supplied to the Drive-Away Company through the Service Company.

The Wage and Hour Division has found to its satisfaction the facts necessary to place these employees of the Service Company under its jurisdiction for the purposes of the Fair Labor Standards Act. The record contains no suggestion that the Interstate Commerce Commission or any other administrative body has found that these employees of the Service Company are or should be treated as employees of the Drive-Away Company for the purposes of the Interstate Commerce Act. This case, therefore, is decided upon the basis that the parties have stipulated and the trial court has found that these employees are employees of the partnership, the Service Company, which is the relationship established for them by the petitioners as their employers. See *Schenley Distillers Corp.* v. *United States*, No. 560, decided January 2, 1946, for a case giving effect to certain other consequences under the Motor Carrier Act of a corporate arrangement chosen by the persons concerned as a means of carrying on their business. See also *Higgins* v. *Smith*, 308 U. S. 473, 477, for a different result under other circumstances.

In the absence of power in the Interstate Commerce Commission to establish the maximum hours of service of these employees, the provisions of the Fair Labor Standards Act as to their maximum hours of employment remain applicable to them.

It appears from the face of the Motor Carrier Act that § 204 refers only to the regulation of "carriers." Moreover, Section 226 of the Act (formerly numbered 225, 54 Stat. 929, 49 U. S. C. § 325), which authorizes investigations by the Commission as a basis for the regulation of the maximum hours of service of employees under § 204, refers only to investigations of the "maximum hours of service of employees of all motor carriers and private carriers of property by motor vericle."[7] The legislative history

[7] "SEC. 225. The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and *maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle;* and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special

of the section is reviewed in *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 544-550.

The Interstate Commerce Commission has written many decisions defining the limits of its authority to prescribe qualifications and maximum hours of service for employees of motor carriers under § 204(a)(1)(2)(3), but throughout these decisions it apparently has assumed that its jurisdiction is limited to employees of "carriers" which in turn are under the jurisdiction of the Commission. It has, for example, recognized its power to establish maximum hours of service for automobile maintenance mechanics of "carriers"[8] but at the same time has said—

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knowledge of any such matter." (Italics supplied.) 49 Stat. 566, 49 U. S. C. § 325, renumbered as § 226 by 54 Stat. 929.

In discussing § 204(a)(1)(2)(3) and §225 Senator Wheeler, sponsor of the Bill, said in explanation of it—

". . . . the committee amended paragraphs (1) and (2) to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of *employees of common and contract carriers*, thus restoring provisions that were in the Rayburn bill, introduced in the Seventy-third Congress. . . .

"In order to make the highways more safe, and so that common and contract carriers may not be unduly prejudiced in their competition with peddler trucks and other private operators of motor trucks, a provision was added in subparagraph 3 giving the Commission authority to establish similar requirements with respect to the qualifications and hours of service of the *employees of such operators*. The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for regulation of this kind provided for in section 225. . . ." (Italics supplied.) 79 Cong. Rec. 5652. See also, p. 5660.

In the House of Representatives, Representative Pettengill read the following observation made by Joseph B. Eastman of the Interstate Commerce Commission—

"The bill . . . gives the Commission authority to prescribe maximum hours of service for the *employees of common carriers, contract carriers, and private carriers of property*. . . ." (Italics supplied.) 79 Cong. Rec. 12,229. See also, S. Rep. No. 482, 74th Cong., 1st Sess. (1935) p. 1.

[8] "Our findings of fact and conclusions of law are as follows:

"*Findings of fact.*—1. That mechanics employed by common and contract carriers and private carriers of property by motor vehicle, subject to part II of the Interstate Commerce Act, devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce. . . .

"*Conclusions of law.*— . . .

"3. That we have power, under section 204(a) of said part II, to establish qualifications and maximum hours of service for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, [mechanics, loaders and helpers employed by carriers] and that we have no such power over any other classes of employees, except drivers." Ex parte No. MC-2, 28 M. C. C. 125, 138-139. See also Ex parte No. MC-2, 3 M. C. C. 665, 667; 6 M. C. C.

"By far the larger proportion of the carriers subject to our jurisdiction operate less than 10 vehicles and do not employ mechanics to repair their vehicles, but on the contrary have such work done in commercial garages. *We have, of course, no jurisdiction over employees working in commercial garages.*" (Italics supplied.) *Ex parte No. MC-2, In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125, 132.

The Administrator of the Wage and Hour Division of the Department of Labor has interpreted § 13(b)(1) of the Fair Labor Standards Act consistently with the interpretation given to it by the Interstate Commerce Commission.[9] The interpretation of this Act by each of these agencies is entitled to great weight. *United States* v. *Amer. Trucking Ass'ns*, 310 U. S. 534, 549.

Throughout the discussion of these sections by this Court in *United States* v. *Amer. Trucking Ass'ns, supra*, and in *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44, it is assumed that they refer to employees of "carriers" and of "motor vehicle operators" which are themselves under the jurisdiction of the Interstate Commerce Commission, and there is nothing in either case to indicate an interpretation by this Court that the exemption prescribed in § 13(b)(1) extends to workers whose services affect the safety of operations of motor vehicle carriers but who are not themselves employees of a carrier.

In this view of this case, it is not necessary to determine what kind of a carrier the Drive-Away Company is or even whether it is a carrier within the meaning of the Motor Carrier Act because

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557; 11 M. C. C. 203; Ex parte No. MC-28, Jurisdiction Over Employees of Motor Carriers, 13 M. C. C. 481, 488; Ex parte No. MC-3, Motor Carrier Safety Regulations—Private Carriers, 23 M. C. C. 1, 8.

[9] See Interpretative Bulletin No. 9, Wage and Hour Division, Office of the Administrator, originally issued March, 1939, 5th Rev., October, 1943. 2 C. C. H. Labor Law Service, ¶32,109. Where motor vehicle drivers or mechanics are employed by companies engaged in certain types of interstate transportation over which the Interstate Commerce Commission disclaims jurisdiction, they are held to be covered by the Fair Labor Standards Act. For example, if such employees are engaged in the transportation in interstate commerce of consumable goods, such as food, coal and ice, to railroads and docks for use in trains and steamships, jurisdiction over them is disclaimed by the Commission but is accepted by the Wage and Hour Division as covered by the Fair Labor Standards Act. Interpretative Bulletin No. 9, *supra*, Par. 6(b). The Wage and Hour Division also accepts jurisdiction over employees engaged in the transportation of mail in interstate commerce who are employed, not by the carrier, but by a contractor dealing directly with the Post Office Department. *Id.*, Par. 7(b).

the employees involved in this case are not its employees. Similarly, it is not necessary to determine which of the employees of the Service Company do work which affects the safety of the operation of motor vehicles because that classification applies to employees whose hours are regulated by the Interstate Commerce Commission, and not to those whose hours are regulated by the Fair Labor Standards Act.

For these reasons we find that petitioners' employees come within the coverage of the Fair Labor Standards Act of 1938 and not within the exemptions stated in either § 13(a)(2) or § 13(b)(1) of that Act, and the judgment of the Circuit Court of Appeals, therefore, is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

M. Justice DOUGLAS, dissenting.

I agree that these employees would be covered by the Fair Labor Standards Act but for the exemption contained in § 13(b)(1). That subsection exempts from § 7 of the Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935."

There is no doubt that the Interstate Commerce Commission has the power to establish qualifications and maximum hours for employees of a carrier who are mechanics engaged in greasing, repairing, servicing, and maintaining its transportation equipment. *In the Matter of Maximum Hours of Service of Motor Carrier Employees*, 28 M. C. C. 125. I think that power would still exist if the carrier separately incorporated its garage. This affiliated garage is not like an independent commercial garage. It is still a part of the carrier's business—no more separate or distinct than any other department. The same people own it, operate it, and manage it. If the Interstate Commerce Commission, acting under § 204 of the Motor Carrier Act of 1935, had undertaken to establish the qualifications and maximum hours for these mechanics, I cannot believe that we would allow its jurisdiction to be defeated by that device, whatever may have been the reason for the separate incorporation of the garage. For these

mechanics were, in the practical sense, employees of the carrier after, as well as before, incorporation. And the exemption contained in § 13(b)(1) of the Fair Labor Standards Act is dependent not on the exercise by the Interstate Commerce Commission of its power, but on the existence of that power.[1] The power which Congress granted the Interstate Commerce Commission to establish qualifications and maximum hours for mechanics should not be allowed to be defeated by arrangements between parties which, for certain purposes, may estop them from asserting that two corporations in form are one in substance.

This particular exemption may not be a wise one. But we must take the law as it is written. The policy behind the exemption is defeated, if mere legal forms are allowed to nullify the power of the Interstate Commerce Commission to deal with the problem of safety. As the Commission said, ". . . the carefully supervised work of skilled mechanics is a most important factor in the prevention of accidents, and therefore in the promotion of highway safety." *In the Matter of Maximum Hours of Service of Motor Carrier Employees, supra*, p. 133. We should refuse to whittle down that jurisdiction, even though we thought that the public interest would be better served by broadening the coverage of the Fair Labor Standards Act.

Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE join in this dissent.

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[1] To date the Commission has prescribed qualifications and maximum hours only for drivers. See 49 Code Fed. Reg., Cum. Supp. 1944, Parts 191, 192